SUPREME COURT, U. S.
Supreme Court, U.S.
FILED
FEB 18 1972

IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No. 71-1064

HONORABLE JACK B. WEINSTEIN,
UNITED STATES DISTRICT JUDGE
FOR THE EASTERN DISTRICT OF NEW YORK,
and ALBERT GRUNBERGER,

v.

UNITED STATES OF AMERICA,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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OPINION BELOW

The opinion of the Court of Appeals for the Second Circuit (Appendix A pp. 1a-25a, *infra*) is not yet reported.

JURISDICTION

The opinion and judgment of the Court of Appeals for the Second Circuit (Appendix A, pp. 1a-25a, *infra*) was filed on November 16, 1971. A timely petition for rehearing and suggestion for rehearing in banc were filed on November 30, 1971, and were denied on December 20, 1971

(Appendix B, p. 1b, *infra*). On January 13, 1972, Mr. Justice Marshall granted an extension of time to and including February 18, 1972, for the filing of a petition for a writ of certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a District Judge's order terminating a prosecution in favor of a defendant by dismissal of an indictment after trial because the principal government witness' testimony was "incredible" and had been substantially altered between the defendant's first and second trials was substantially a "judgment of acquittal" and, therefore, not reviewable under the rule of *United States v. Sisson*, 399 U.S. 267 (1970).

2. Whether the Double Jeopardy Clause of the Fifth Amendment bars any review by the Court of Appeals at the request of the prosecution of a post-trial District Court order terminating a prosecution on the basis of evidence presented at trial.

3. Whether mandamus could be used by the prosecution to have the nonappealable order vacated.

4. Whether a United States District Court has inherent power to terminate a criminal prosecution after trial, for articulated reasons relating to the credibility of the prosecution's evidence.

STATEMENT.

On June 10, 1971, after a guilty verdict in a jury trial held before him, United States District Judge Jack B. Weinstein entered an order dismissing an indictment filed on August 29, 1967, against petitioner Albert Grunberger. The government petitioned for mandamus to vacate this order on October 5, 1971, and the decision of the Court of Appeals granting that petition is the subject of this petition for review.

The background of the mandamus action may be briefly summarized: Petitioner Grunberger and one Jechiel Herstig[1] were charged in 1967 with having participated on July 19, 1967, in a transaction which was alleged to be a sale of 3,000 smuggled Swiss watch movements to one Kalman Berger, and with having conspired to commit that offense. The indictment gave rise to two trials of Grunberger, each having a substantially different scenario.

The issues for the juries at both trials turned entirely on the credibility of Berger and petitioner Grunberger, who gave diametrically opposite testimony as to the nature of their meeting on July 19.[2] Berger had been indicted for watch smuggling, and he admitted that he had been assured of leniency if he would make a case against Grunberger. As summarized by the court below, Berger's testimony at the first trial was that "he simply agreed [with Grunberger] to make a swift purchase of a large quantity of movements" (p. 5a, *infra*), and that this "buy" was consummated on July 19, 1967—with the exchange of the watch movements for a post-dated check in the amount of $12,000 which Berger gave to Grunberger at that time. Petitioner Grunberger, on the other hand, testified that the watch movements belonged to Berger, and that Herstig had been keeping them as collateral for a $12,000 loan he had made to Berger. Grunberger testified that both Berger and Herstig prevailed upon him to act as an intermediary in returning the movements to Berger in exchange for repayment of the

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[1] The co-defendant, who was not a resident of the United States, was never arrested and had left the country before his indictment.

[2] There was no question as to the meeting itself, which was observed by agents of the Bureau of Customs. It occurred in mid-day in downtown Brooklyn, and Berger was seen giving petitioner Grunberger a check and a parking lot ticket. Grunberger then gave the ticket to Herstig, who secured a car from a parking lot and returned some time later with approximately 2000 watch movements in the car's trunk. The meetings between Berger and Grunberger took place in a restaurant, and Grunberger's meetings with Herstig occurred in neighboring restaurants.

$12,000, and that his participation in the events of July 19 was entirely innocent.

The first jury returned a guilty verdict on four of the six counts in the indictment,[3] and Grunberger appealed from the judgment. The Court of Appeals reversed the conviction because of several trial errors (431 F.2d 1062), noting as well that "Grunberger's story was inherently credible and dovetailed with the corroborating evidence the Customs officials were able to produce." 431 F.2d at 1066, n. 7. In granting a new trial, the Court of Appeals observed twice that this was a case involving "close factual issues" (*ibid.*; 431 F.2d at 1069) and that "the Government's case was not particularly strong" *(Ibid.)*

While the case was on appeal, Grunberger obtained new evidence strongly corroborating his testimony that the 2000 watch movements were Berger's. Scientific tests showed that they had been initially manufactured with the trade name "*LEICA*," which, as the Court of Appeals noted, "was Berger's trade name at least until just prior to the transaction here at issue" (p. 4a, *infra*). That name had been erased[4] and a different trade name, not traceable to Berger, was on the movements as of July 19, 1967. The Court of Appeals observed in its opinion that since the case

[3]Berger admitted at the first trial that the 2000 movements were not worth $12,000, but he claimed that Grunberger also gave him a key to a subway locker where he found an additional 1000 movements (although, according to his testimony, Grunberger represented that the locker contained several bottles of liquor). The jury acquitted Grunberger on a separate count of the indictment relating to the 1000 watch movements. The government's testimony at both trials was that the 2000 movements were worth not more than $8,000 or $8,500 (before payment of duty) and that the 3000 movements were worth substantially more than $12,000.

[4]The proof that the trade-name had been changed also buttressed Grunberger's explanation as to what he had been told regarding the custody of the movements by both Berger and Herstig. He testified that the movements had been given to Herstig by Berger for Herstig —who did odd jobs in watch repair and adjustment—to erase the name "*LEICA*" and substitute a different brand name.

was being remanded for a new trial, the defense would be free to introduce the newly discovered proof at such a trial if "the Government chooses to retry [the petitioner]." 431 F.2d at 1067, n. 8.

The case went to trial again, this time before Judge Weinstein and a jury. The petitioner's new evidence had been disclosed to the prosecution and it, in turn, had communicated it to Berger.[5] In light of the new evidence, the counts of the indictment charging sale and conspiracy were dismissed by the prosecution after the jury was impaneled.

At the second trial, Berger's testimony regarding the transaction was substantially different from the story he told at the first trial. He now claimed that he had ordered the watch movements in question from petitioner Grunberger more than two-and-a-half years before they were delivered—and even asserted that the movements bore the tradename "*LEICA*" on July 19, 1967.[6] Grunberger testified to the same effect as he had in his first trial, and, in addition, a deposition of Herstig—taken in a U.S. Consulate abroad with cross-examination by government counsel—was read to the jury. It corroborated Grunberger's testimony in every material respect.

Judge Weinstein denied motions for judgment of acquittal made at the conclusion of the government's case and at the close of all the evidence, although he stated on both occasions that he did not believe Berger and that if he were the trier of the fact, he would return a verdict of not guilty. (Transcript, pp. 1342, 1346, 1350, 1718). After six hours

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[5] Berger, had, in the meantime, received a suspended sentence on his plea of guilty to his own smuggling indictment because of the prosecution's recommendation for leniency.

[6] The Court of Appeals observed that this was demonstrably false since "all the watches recovered on July 19 showed the inscription COVA" and concluded that "[a]pparently Berger was not aware that the *LEICA* inscription had been found only after careful scientific examination disclosed that it underlay COVA, and Berger could thus not have seen it when the movements were delivered" (pp. 5a-6a, *infra*).

of deliberation, the jury found Grunberger—an alien who, the record demonstrates, had difficulty understanding and speaking the English language—guilty of facilitating the transportation and concealment of smuggled watch movements. Immediately on return of the verdict, Judge Weinstein stated that arguments for upsetting the verdict were "weighty" and that he would give them substantial consideration because he was "not happy with the way this case proceeded generally" (Transcript, p. 1726). After stating that he was prepared to sentence immediately and permit motions for a judgment of acquittal and for a new trial to be filed later (*id.* at 1705-1706), the judge deferred sentencing—at the request of the Assistant United States Attorney—until after the filing of the presentence report.

On June 10, 1971—more than two-and-a-half months after the verdict[7]—the case was set for further argument. Judge Weinstein noted, at the inception of the hearing, that he was reserving judgment on the motions for judgment of acquittal and for a new trial filed on behalf of Grunberger. He then proceeded to sentencing and imposed a suspended one-year sentence and a fine of $10,000. Immediately thereafter, he said as follows (Transcript, June 10, 1971, pp. 8-10):

> Now, I will address myself to the question of the motions.
>
> Pursuant to the authority that I have under Rule 33, I would grant a new trial to this defendant as required in the interest of justice based upon my hearing of Mr. Berger and a comparison of what he said in this trial and what he said in the other trial, and I believe that his statements were incredible, and that he is not worthy of belief. This, however, was a matter for the jury, and if that were the only

[7]Petitioner's counsel filed motions within the time allowed by the court, but the government filed no response. On May 14—at a hearing held on the motions—the court continued the matter on instructing the government to answer the petitioner's motions and brief.

reason for granting a new trial, I probably would allow the verdict to stand, but I think that his testimony plus the physical evidence in the case as determined from inspection of the records and dials and the like and the German manufacture of the dials, and the changes in the story of Mr. Berger and the inconsistencies within the story, as well as I think the strong feeling I get from the record that the government agency involved, and I do not criticize the agency for believing that this defendant is a well-known smuggler,[8] but that agency had to a greater degree than is normally acceptable, suggested to Mr. Berger its desire to see that this defendant was convicted and take into account the suggestibility of Mr. Berger and his incapacity to distinguish between fact and falsity when his own interests are at stake, and, I think, the danger of a miscarriage of justice was too great in this case.

With all those circumstances plus others I won't advert to, it seems to me to come within the specific terms of Rule 33, that it requires a grant of a new trial in the interests of justice.

In this case, however, it seems to me, a new trial would not serve any useful purpose because I believe that the government has presented this evidence it now has as forcibly as it could be presented to this jury. I do not believe that a re-trial would serve any purpose at all except to exhaust the government to require the expenditure of substantially more public revenue, and it certainly wouldn't serve the defend-

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[8]The pre-sentence report disclosed that the Customs Bureau's "belief" on this subject was based on the most tenuous hearsay—*i.e.*, that a certain unnamed "courier" had identified Grunberger as one "Boruch Hirsh" who was notorious as a smuggler. Grunberger unequivocally denied this allegation, and, at an earlier hearing, Judge Weinstein said of this allegation, "I don't believe there is any basis for it, and I am not going to accept any of this hearsay." (Transcript, May 14, 1971, p. 18.) His statement at sentencing was, therefore, intended solely to absolve the agency from any blame for its suspicion, but not to accept it as true or credible in any manner.

ant's purposes, because I don't see how the defendant can make a stronger defense at the second trial.

Accordingly, I am going to dismiss the indictment.

Now, I have serious doubts about my power to do so, which is why I sentenced this defendant in the first place.

On that date Judge Weinstein signed two orders, and the record does not show in what sequence they were entered (Appendix C, pp. 1c-2c, *infra.*) One of the orders stated the sentence imposed by the court; the other stated that "on oral motion of the defendant" the court dismissed the indictment.[9]

The United States filed a notice of appeal on July 9, 1971. On October 5, it instituted the present action for mandamus.[10] The Court of Appeals directed that a response be filed by October 12, 1971, and it set oral argument for October 14. It granted the government's petition on November 16, 1971, rejecting the contentions that mandamus was being used in this case by the government to obtain reversal of a non-appealable order terminating a prosecution, on the merits of the general issue, in favor of a criminal defendant. In its opinion, the Court of Appeals authorized Judge Weinstein to grant a third trial to the petitioner, but rejected the proposition that a judge had inherent authority to terminate a criminal prosecution in the interest of justice.

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[9]In fact, defendant's counsel made no oral motion to dismiss. The only motions made by the defendant were for judgment of acquittal under Rule 29 and for a new trial under Rule 33.

[10]The Court of Appeals opinion states that the delay was "occasioned . . . by the need for obtaining the approval of the Solicitor General" (pp. 8a-9a, *infra*). The affidavit of the Assistant United States Attorney on file in the Court of Appeals states, however, that authorization of the Solicitor General was received in the United States Attorney's office on August 2, 1971—approximately two months before the petition for mandamus was filed.

REASONS FOR GRANTING THE WRIT

This is a case in which an able and experienced District Judge has, after hearing the evidence presented at trial and comparing it with evidence at an earlier trial, concluded that there is a substantial enough danger that a miscarriage of justice will occur by the conviction of an innocent man to warrant termination of the prosecution. For reasons stated below, we believe that the inherent authority of a District Judge to act in this manner has sound roots in traditional usage, and the Court of Appeals' holding that no such power exists conflicts, in principle, with decisions in other circuits and presents an exceedingly important question of law warranting consideration and decision by this Court.

Preliminary to this issue, however, are several equally important jurisdictional questions. The court below decided all these questions in favor of the prosecution, and its rulings conflict with authoritative decisions of this Court governing (1) the right of the government to obtain review of adverse final determinations in criminal cases, (2) the protection afforded by the Double Jeopardy Clause of the Fifth Amendment against government appeals in criminal cases, and (3) the proper scope of the writ of mandamus in criminal cases. And with respect to the first two of these jurisdictional issues, the government's position in this case conflicts with a policy applied by the Solicitor General since at least 1949—and relied upon by this Court in its 1970 decision in *United States v. Sisson*, 399 U.S. 267 (1970). Moreover, insofar as the decision below permits appellate reivew, at the instance of the prosecution, of a district judge's order terminating a prosecution, it conflicts squarely with recent decisions of the First and Seventh Circuits which have substantially narrowed the government's right to secure review by appeal or mandamus of orders terminating federal criminal prosecutions. And in these conflicting decisions there has been far less basis for applying the policies of the Double Jeopardy Clause or of the limitations on government appeal allowed by 18 U.S.C. § 3731

than in this case—where the Judge's ruling was based on trial evidence and it came after the defendant had been compelled to undergo a jury trial.

1. *The prosecution was not entitled to appellate review of Judge Weinstein's order of dismissal.*—This Court and Courts of Appeals in several circuits have, in recent years, considered in what circumstances the prosecution can obtain appellate review of different kinds of district court orders terminating criminal prosecutions in favor of the accused. In no reported case have the reasons of law and policy *against* appellate review been as strong as they are here; yet in this case the court below rejected the argument summarily. Its decision conflicted squarely with *United States v. Sisson*, 399 U.S. 267 (1970), and with the recent application given to *Sisson* in recent decisions of the First and Seventh Circuits in *United States v. Findley*, 439 F.2d 970 (1st Cir. 1971); and *United States v. Ponto*, No. 18396 (7th Cir. *en banc*, decided December 28, 1971) (Appendix D, pp. 1d-31d, *infra*).

i. *Sisson*—On the face of his explanation it is clear that Judge Weinstein terminated the prosecution entirely because of (1) his conviction that the testimony of the key government witness was "incredible," (2) a comparison of the witness' second story with his first,[11] and (3) an evaluation of what the Customs Bureau had said to Berger in persuading him to cooperate.[12] This made the dismissal an order terminating the prosecution "on the basis of evidence adduced at trial" within the rule of *Sisson*, 399 U.S. at 288.

[11] The full variation in Berger's testimony could not be appreciated without reading the entire testimony at the first trial. Accordingly, cross-examination of the witness based on specific answers at the first trial left the jury with only part of the picture. And the judge noted after the second jury's verdict that he had not theretofore read the transcript of the first trial so as not to prejudice Grunberger (Transcript, pp. 1733-1734).

[12] Grunberger's counsel contended at trial that the Customs Bureau had not merely sought Berger's cooperation in apprehending other violators. It had, rather, singled out Grunberger as the man they

Under the square holding of this Court in *Sisson*, the order therefore constituted an "acquittal" which is not reviewable in any appellate court. In *Sisson* this Court held that Judge Wyzanski's action in terminating a prosecution for willfully refusing induction after a jury verdict of guilty constituted a nonreviewable acquittal because "the disposition is bottomed on factual conclusions not found in the indictment but instead made on the basis of evidence adduced at the trial. . . ." 399 U.S. at 288. Judge Wyzanski had labelled his post-verdict disposition an "arrest of judgment" and he had apparently chosen that label in order to assure the government appellate review of his action. 399 U.S. at 279, n. 7. This Court expressly rejected the contention that Judge Wyzanski's characterization of his own action could control the jurisdictional determination. 399 U.S. at 279, n. 7, 290 and n. 19.

The *Sisson* definition of "acquittal"—*i.e.*, a judicial decision terminating the prosecution "on the basis of facts adduced at the trial relating to the general issue of the case," 399 U.S. at 290, n. 19—was reaffirmed unequivocally by seven members of the Court in *United States v. Jorn*, 400 U.S. 470, 487, n. 7 (opinion of Mr. Justice Harlan); 489, n. 2 (opinion of Mr. Justice Stewart). And in *Sisson* itself the dissenting Justices apparently agreed that a legal determination based on evidence at trial going to the general issue was an acquittal; their disagreement turned only on the applicability of that standard to the facts of the case. See, *e.g.*, the opinion of Mr. Justice White (399 U.S. at 328, n. 4, 332-333, n. 6). No similar question is present here; Judge Weinstein relied exclusively on testimony he witnessed at trial and reached conclusions as to the credibility of the government's chief witness and the undue influence placed upon him by a government agency.

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wanted and made the conviction of Grunberger the price of Berger's freedom.

An analysis of the reasons given by the court below for rejecting the *Sisson* argument demonstrates the error of the Court of Appeals' decision (p. 18a, *infra*):[13]

> Defendant's principal argument on the merits is that although the judge characterized his order as one dismissing the indictment, in truth and fact it was a judgment of acquittal. [1] We have the gravest doubt whether the judge's undoubted power to set aside a verdict and enter a judgment of acquittal, F.R.Cr.P. 29(c), can survive the entry of a *judgment* of conviction; the two actions seem antithetical. [2] Beyond that, however, to characterize the judge's order dismissing the indictment as one of acquittal would be to attribute to him a purpose he repeatedly and rightly disclaimed. We have already cited numerous instances of such disclaimers; there are many more. [3] Beyond that the judge was entirely correct in acknowledging that he had no 'right' to direct acquittal because of disbelief of the prosecution's witness, even though before entering judgment of conviction he had the 'power' to do so * * * * [Emphasis in original]

The second justification offered—*i.e.*, Judge Weinstein's characterization of his action as a "dismissal of an indictment" rather than a "judgment of acquittal"—is foreclosed by the already discussed express ruling in both *Sisson* and *Jorn* that the trial judge's label of his action cannot control the question whether that action in fact constitutes an acquittal.

The third justification is a classic example of a "merely erroneous" trial court ruling as opposed to a ruling going to either "power" or "jurisdiction." See *Will v. United States*, 389 U.S. 95, 98 n. 6 (1967).[14]

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[13]Numbers in brackets have been added to separate the three distinct reasons given by the court below for rejecting the *Sisson* argument.

[14]The court in *Sisson* elaborately spelled out the "compromise origins" of the Criminal Appeals Act as revealed by a detailed study of the legislative history. 399 U.S. at 307. Crucial to that compromise

The whole of the Court of Appeals' reasoning on the "acquittal" issue thus comes down to a single asserted distintinction between this case and *Sisson*—*i.e.*, the District Court's "undoubted power to set aside a verdict and enter a judgment of acquittal F.R.Cr.P. 29(c), [cannot] survive the entry of a *judgment* of conviction. . . ." (Emphasis in original.)

The use of the term "power" here in order to bypass *Sisson* illustrates the ambiguities of this term referred to by a unanimous Court in *Will*, See 389 U.S. at 98, n. 6. Surely, the court below was not suggesting that by sentencing Grunberger, the district court lost jurisdiction over the subject matter or the parties to this suit. A court ordinarily retains jurisdiction over a criminal case after a judgment of conviction until either the time for post-trial motions expires or an appeal is perfected. Compare *Berman v. United States*, 302 U.S. 211 (1937), with *Draper v. Davis*, 102 U.S. 370 (1880). Indeed, if Judge Wyzanski had sought to make his ruling appealable by initially sentencing Sisson and then granting the motion in arrest of judgment (compare F.R.Cr.P. 34 with F.R.Cr.P. 29) would that sequence have made his action reviewable? Yet that is precisely what happened in this case. After expressly referring to the jurisdictional problem created under the Second Circuit's earlier *Dooling* decision by a refusal to sentence, Judge Weinstein *stated unequivocally that he was going to sentence Grunberger before ruling on the motions in order to give the government appellate review.*

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was the Congressional determination that the government have no appeal "under any circumstance when the defendant is acquitted *for any error whatever committed by the Court*. . . ." 399 U.S. at 289, quoting from 41 Cong. Rec. 2752. (Emphasis in original.) See also *Jorn*, 400 U.S. at 476 U.S. at 476. Obviously then, "a legal determination on the basis of facts adduced at the trial relating to the general issue of the case" is no less an "acquittal" barring appellate review under the Congressional policy employed in *Sisson* and *Jorn* because the legal determination is erroneous, "*no matter how erroneous the constitutional theory underlying* the [legal determination]." 399 U.S. at 289 (emphasis in original).

Moreover, the suggestion that Judge Weinstein had "no power" to acquit after pronouncing sentence conflicts with the lower court's own conclusion that he retained power (which he still possesses) to act on the motion for a new trial. There is no language in Rule 33 (new trial) which confers more authority after "entry of final judgment" than under Rule 29 (acquittal). Rule 33 reads:

> A motion for a new trial based on any other grounds [*i.e.*, other than newly discovered evidence] shall be made within 7 days after *verdict or finding of guilty or within such further time as the court may fix during the 7-day period.*

Rule 29(c) reads:

> If the jury returns a verdict of guilty or is discharged without having returned a verdict, *a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period.*

The district court's power to act under Rule 29 *after* sentence must, therefore, be the same as it is before sentence and as it is under Rule 33 after sentence. If not, the decision below would mean that a district judge would also be "powerless" after sentencing to change his mind on the basis of a renewed defense plea—within time permitted by order under Rule 29—which persuaded him that the evidence was insufficient to warrant submission to the jury.[15] At bottom, the government's claim here cannot really be that Judge Weinstein had no "authority" to enter an acquittal after sentencing; it is nothing more than a challenge to his reasons for terminating the prosecution. And it is pre-

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[15] Indeed, in this very case, Judge Weinstein was ready to sentence immediately upon return of the jury verdict and to consider motions under both Rules 29 and 33 thereafter. (Transcript, pp. 1705-1706, 1739-1742). If he had been persuaded by such a post-sentence submission that the evidence was insufficient, would he have lacked authority to enter an order under Rule 29?

cisely that kind of ruling which was held to be an acquittal in *Sisson* and also held nonappealable in *Will v. United States*, 389 U.S. 90 (1967).[16]

Finally, we submit that in seeking review here from a decision terminating the prosecution after trial, the government violated the Solicitor General's own consistent policy since *United States v. Zisblatt*, 172 F.2d 740 (2d Cir.), *appeal dismissed*, 336 U.S. 934 (1949), which was explained in the government's brief in *Sisson*. In *Zisblatt*, a trial judge "dismissed" an indictment *after* the jury's return of a guilty verdict on the ground that prosecution was barred by the statute of limitations. (The same defense had been rejected by another district judge at the pre-trial stage.) As was true here, the district judge in *Zisblatt* had pending before him a motion for acquittal under Rule 29, but he neither granted nor denied that motion. The Court of Appeals for the Second Circuit (per L. Hand, J.) certified the government's appeal to this Court. But after the certification, the Solicitor General dismissed the appeal. His reason—as stated in the government's brief in *Sisson* and quoted, *verbatim*, by this Court—was "that the statute barred appeals from the granting of motions in bar after jeopardy had attached." He represented that the government "has thereafter adhered to that position, and * * * has never sought to appeal in these circumstances." 399 U.S. at 306. In the present case—in violation of the rule of *Will v. United States*, 389 U.S. 90, 97 (1967), that mandamus "may never be employed as a substitute for appeal

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[16] In our argument on this point, we have relied on that part of the majority opinion in *Sisson* which was generally accepted. Plainly, under the rule of *Sisson* propounded by Mr. Justice Harlan's opinion for four members of the Court, there is no possibility of appellate review: "[E]xcept for decisions arresting judgment, there can be no government appeals from decisions rendered after the trial begins." 399 U.S. at 307. Judge Weinstein's decision was plainly not an "arrest of judgment," and it came—as did that in *Sisson*—after the trial began *and ended*. Hence its nonreviewability is squarely covered by *Sisson*.

in derogation of * * * [the] clear policies" limiting government appeals in criminal cases to those "orders terminating the prosecution" specified in the Criminal Appeals Act (18 U.S.C. § 3731)—the government has violated its own policy as well as the legal principles established by this Court.

ii. *Circuit court decisions.*—The First and Seventh Circuits have recently held that pretrial "dismissals" of indictments are nonreviewable under *Sisson* where they are based on facts which *could* have been raised at trial. *United States v. Findley*, 439 F.2d 970 (1st Cir. 1971); *United States v. Ponto*, No. 18396 (7th Cir., December 28, 1971) (Appendix D, pp 1d-31d, *infra*); *United States v. Gustavson*, No. 18315 (7th Cir., December 28, 1971) (Appendix E. pp. 1e-4e, *infra*). All these cases involved dismissals (1) before jeopardy had attached (*i.e.*, before impanelment of a jury or beginning of the trial), and (2) on the basis of evidentiary material not relating as directly to guilt or innocence as the grounds stated here by Judge Weinstein. Yet the Seventh Circuit in *Ponto* went so far as to hold, by a majority of the *in banc* court, that the district judges' pretrial ruling foreclosed all further proceedings under the Double Jeopardy Clause of the Fifth Amendment.

The *Findley*, *Ponto* and *Gustavson* cases cannot be distinguished on the ground that the dismissals there were within the district court's "jurisdiction." As the panel opinion in *Ponto* demonstrates, the government objected vigorously to the procedure being used by the judge (Appendix F, pp. 1f-12f, *infra*),[17] and the Court of Appeals refused

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[17]The district judge in *Ponto* determined to treat the pretrial motion as the equivalent of a motion for summary judgment in a civil case. The Untied States Attorney said (p. 4f, *infra*):

> Well, your Honor, we would object to proceeding under a motion for summary judgment because, to my knowledge, there is no such thing in a criminal case. Now, I just would object to that most vigorously. * * *

The trial judge believed, however, he could achieve that result by ordering the indictment "dismissed."

to grant the relief requested by the government even if its application were treated as a petition for mandamus (p. 11d, *infra*, at n. 10). In any event, it would be anomalous if the effect of the ruling below and the First and Seventh Court decisions were that a dismissal of the kind entered by Judge Weinstein would be final if it came *before* trial (when he had not heard the evidence)—or, indeed, before a retrial—but it would be vacated as beyond his power if entered *after* trial. Surely the policies warranting limitation on government appeals under the Criminal Appeals Act and the Double Jeopardy Clause apply much more forcefully to the termination of a prosecution *after* jeopardy has attached and a defendant has been put to the ordeal of a trial than *before* trial begins.

We have discussed this initial jurisdictional question in greater detail than is usual in a petition for writ of certiorari because we believe that the decision below is so plainly inconsistent with *Sisson* that it might be summarily vacated on that basis. The very least that can be said, however, is that certiorari should not be denied given the holdings in *Ponto* and *Findley*.

The government may contend that the interpretation of the pre-1971 Criminal Appeals Act is not of continuing importance. But the broad application of the Double Jeopardy Clause to government appeals in *Ponto* affects the current statute as well, and the basis for the Seventh Circuit's in banc holding on the Fifth Amendment point was the *Sisson* definition of an "acquittal." Finally, the circumstances of this case bring it so clearly within the policies of *Sisson*, and the effects of the decision below on the petitioner are so personally and economically severe,[18] that the

[18] Although the Court of Appeals strongly implied that the District Judge should grant a new trial, the judge explicitly stated at the time of his ruling that he would not do so. Hence Grunberger will probably be put to the expense and strain of another appeal and, if this results in a new trial, to a third trial. Because of the pendency of

case should not be ignored simply because the statute has been amended.

2. *The decision below conflicts with this Court's holdings on the Double Jeopardy Clause and the mandamus power.*—In granting the government's petition for mandamus, the court below also disregarded this Court's decision in *Fong Foo v. United States*, 369 U.S. 141 (1962), where the government had similarly contended that a district judge had acted in excess of his authority by terminating a criminal proceeding in mid-trial because "of two grounds: supposed improper conduct on the part of the Assistant United States Attorney who was prosecuting the case, and a supposed lack of credibility in the testimony of the witness for the prosecution who had testified up to that point." 369 U.S. at 142. The Court of Appeals had granted the requested writ on the ground that the acquittal entered for the reasons stated was "not only plainly erroneous but beyond [the trial judge's] jurisdiction." 286 F.2d at 560. In *Fong Foo*, as in this case, the Court of Appeals viewed the district judge's action as "not mere error but usurpation of power," 286 F.2d at 562, and it relied, as the court below had done, on *Ex parte United States*, 242 U.S. 27 (1916). This Court rejected the "jurisdiction—mere error" distinction as follows (369 U.S. at 142):

> The petitioners were tried under a valid indictment in a federal court which had jurisdiction over them and over the subject matter. The trial did not terminate prior to the entry of judgment, as in *Gori v. United States* * * *. It terminated with the entry of a final judgment of acquittal as to each petitioner. The Court of Appeals thought, not without reason, that the acquittal was based upon an egregiously erroneous foundation. Nevertheless, "[t]he verdict of acquittal was final and could not be

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these charges, his immigration status has been kept in abeyance by the Immigration and Naturalization Service.

> reviewed . . . without putting [the petitioner] twice in jeopardy, and thereby violating the Constitution."

Here, as in *Fong Foo,* a trial judge with jurisdiction over the parties and the subject matter of the suit terminated the prosecution on the basis of lack of credibility of the prosecution's witness. No matter how "egregiously erroneous" that judicial action was, government review is barred by the Fifth Amendment.

This case presents a classic instance of an individual subjected to "embarassment, expense and ordeal and [compelled] to live a continuing state of anxiety and insecurity" because the State is making "repeated attempts to convict [him] for [the] alleged offense." *Green v. United States,* 355 U.S. 184, 187-88 (1957); see *United States v. Jorn,* 400 U.S. 470, 479 (1971) (plurality opinion). Over a period of four and one-half years petitioner Grunberger has endured two full trials at considerable expense on two entirely separate government theories of the allegedly criminal behavior, the second worked up after defense counsel produced physical evidence conclusively demonstrating the impossibility of the first theory. The second trial terminated after the trial judge concluded that the government's chief witness was lying. The judge also found that the government had overreached with respect to that witness in its zeal to secure a conviction. Finally, the petitioner has steadfastly maintained his innocence throughout. In *Green* and *Jorn,* the Court found that double jeopardy policies reached this kind of individual suffering even in the absence of any indication of prosecutorial harassment. The facts of the instant case present a much stronger example of the type of injury said in those cases to be at the very core of double jeopardy policies.

It is no answer to say, as the court below did, that since reversal would not require a retrial, there is no violation of the Double Jeopardy Clause. This Court has established the principle—at least since *Kepner v. United States,* 195 U.S. 100 (1904)—that review "even in an appellate court" at the

instance of the prosecution "is to put [the defendant] a second time in jeopardy for the same offense." 100 U.S. at 133.. Here too, the mere act of reviewing Judge Weinstein's order amounts to a violation of the constitutional prohibition.[19]

Nor is the decision of the court below consistent with the principles governing writs of mandamus which this Court announced and applied in *Will v. United States*, 389 U.S. 90 (1967). Judge Weinstein's order dismissing the indictment was a standard form of relief traditionally granted in federal criminal cases in a variety of factual circumstances.[20] Indeed, the routine nature of this kind of relief was demonstrated by the fact that the actual order was typed on a mimeographed form available to judges in the Eastern District of New York for *nolle prosequis* entered on motion of the government. (See Appendix C, p. 2c, *infra*). In addition, Judge Weinstein took this action while he had sole and exclusive jurisdiction over the case. He expressly reserved judgment on pending motions before pronouncing sentence[21] and immediately after the sentencing announced that he would dismiss the indictment and stated his reasons for doing so.

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[19]See also *Green v. United States*, 355 U.S. 184, 188 (1957); *Peters v. Hobby*, 349 U.S. 331, 344-345 (1955).

[20]Trial courts have dismissed indictments at the request of defendants (even prior to the adoption of the Federal Rules of Criminal Procedure) for failure to prosecute (*e.g., Ex parte Altman*, 34 F.Supp. 106 (S.D. Cal. 1940); on grounds of double jeopardy (*United States v. H. E. Koontz Creamery, Inc.*, 257 F.Supp. 295 (D. Md. 1966); because the prosecution has lost certain necessary records (*United States v. Heath*, 147 F.Supp. 877 (D. Haw. 1957), appeal dismissed, 260 F.2d 623 (9th Cir. 1958)); and "on grounds of public policy" (*Robinson v. United States*, 284 F.2d 775 (5th Cir. 1960)).

[21]The reason for first imposing sentence, according to the Judge's explanation, was to enable the government to test, in a court of appeals, whether he had "power" to dismiss for the stated reasons. (Transcript, June 10, 1971, p. 10; see also Trial Transcript, pp. 1739-1741.)

In these circumstances, the issuance of a writ of mandamus by the Court of Appeals violated the guidelines laid down by this Court in *Will v. United States*, 389 U.S. 90 (1967). Dismissal of an indictment—even after a jury's verdict—on the grounds, *inter alia*, that the key government witness' testimony is "incredible" and that the defendant was improperly singled out as the target of his "cooperation" does not present "exceptional circumstances" or a "judicial 'usurpation of power'" within the standard set down in *Will*. 389 U.S. at 95. And here, as in *Will*, resort to appellate courts by the government is additionally unsound because criminal charges are involved and " 'appeals by the Government in criminal cases are something unusual, exceptional, not favored,' *Carroll v. United States*, 354 U.S. 394, 400 (1957), at least in part because they always threaten to offend the policies behind the double-jeopardy prohibition * * *." 389 U.S. at 96.[22]

This case is, therefore, no different than the *Will* case would have been if the government had refused to comply with the order to produce the names of witnesses and the judge had thereupon dismissed the indictment. This Court noted that both parties in *Will* had agreed that "it is highly doubtful that [the government] could appeal" the dismissal (citing *United States v. Apex Distributing Co.*, 270 F.2d 747 (9th Cir. 1959). 389 U.S. at 97, n. 5. Yet under the rationale adopted by the court below, the government could have sought mandamus on the ground that no provision in Rule 7(f) or Rule 12 of the Federal Rules of Criminal Pro-

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[22] Both *United States v. Smith*, 331 U.S. 469 (1947), and *Ex parte United States*, 242 U.S. 27 (1916), on which the court below relied, are plainly distinguishable on these grounds. In *Smith*, the District Judge attempted to act on a case which had become final by operation of law and over which he no longer had jurisdiction. In *Ex parte United States*, the question presented was whether the trial judge had authority to enter an order suspending a term of imprisonment at a time when suspended sentences were not authorized by statute. Hence the form of relief he granted was unlike any recognized by law.

cedure (or in any other Rule) authorized the dismissal of an indictment on that ground.

The mandamus portion of the decision below also collides with *Parr v. United States*, 351 U.S. 513, 520 (1956), where mandamus was held inappropriate to review the authority of a district court to dismiss an indictment at the government's request after the government had obtained a new indictment for the same offense in a district to which the original charge could not have been transferred. This Court held that mandamus was inappropriate because "the most that could be claimed is that the district courts have erred in ruling on matters within their jurisdiction." 351 U.S. at 520. The same terms are applicable to the dismissal involved here, and resort to the mandamus authority was, therefore, inappropriate.[23]

3. *The District Court had inherent authority to dismiss the indictment.*—The substantive issue reached by the court below is of substantial importance in the administration of criminal justice in federal courts and should be authoritatively resolved—particularly since the court below rested its decision on a principle of law which conflicts with decisions of the Ninth Circuit.

The court below held that Judge Weinstein could not terminate this prosecution for the "well articulated reasons" he had given—even though his action was required in the interest of justice—because no express authority for such a dismissal was conferred by the Federal Rules of Criminal

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[23]Nor is *United States v. Dooling*, 406 F.2d 192 (2nd Cir.), *cert. denied sub nom. Persico v. United States*, 395 U.S. 911 (1969), authority for exercise of the mandamus power on these facts. In the *Dooling* case, the judge refused to enter any judgment whatever and a petition for mandamus was filed after he had filed a "proposed" memorandum and order. Moreover, the legal issue—as described by the Solicitor General in his Brief in Opposition in this Court—was whether a District Judge had authority "to dismiss on grounds rejected prior to trial by Judge Weinstein." (Br. in Opp., No. 1187, O.T. 1968, p. 7). No attempt to overrule a pretrial decision is involved in this case.

Procedure and "the failure of the Rules to bestow such a power precludes its exercise" (p. 21a, *infra*). The rejection by the court below of an inherent power to dismiss the indictment in the interest of justice conflicts squarely with the decision of the Ninth Circuit in *United States v. Heath*, 260 F.2d 623 (1958), where the Court of Appeals upheld a district judge's dismissal of an indictment because the prosecution had lost certain key documents. The court held, alternatively, that such a dismissal was "within the inherent power of the District Court," that its "authority * * * to do justice is not encompassed either by rules or by statutes"—and that the Criminal Appeals Act did not "provide an appeal from dismissal by the trial court to prevent injustice." 260 F.2d at 632.

The Ninth Circuit reached the same result *in banc* in *United States v. Apex Distributing Co.*, 270 F.2d 747 (1959), where it sustained the dismissal of indictments on the alternative ground that the court was acting "in the exercise of its inherent power to do justice." 270 F.2d at 756. In other circuits indictments have been dismissed both before and after trial for failure to produce documents or for other reasons not specified in the Federal Rules of Criminal Procedure. *United States v. Nardolillo*, 252 F.2d 755 (1st Cir. 1958); *United States v. Pack*, 247 F.2d 168 (3rd Cir. 1957). In each of these cases, the circuit courts rejected appeals by the government from the dismissal orders.

The court below based its conclusion on several erroneous premises. It mistakenly read the language in 18 U.S.C. § 3771 which invalidates "all laws in conflict with" the Federal Rules of Criminal Procedure as wiping out any inherent power not specified in the Rules. This reasoning conflicts with the conclusion of this Court in *Harris v. Nelson*, 394 U.S. 286 (1969), that district courts have power beyond those conferred by the Fedral Rules whenever needed "in

the interest of justice."[24] It also overlooks the observation of the Eighth Circuit in *Baker v. United States*, 139 F.2d 721, 723 (1944), *cert. denied*, 325 U.S. 894 (1944), that "the authority granted the Supreme Court [to promulgate Rules] did not empower that court to take away from any person by a procedural rule a substantial right given him by law." The right to have an indictment dismissed "in the interest of justice" is such a substantive right and was not affected by the adoption of the Federal Rules.

The important protection given a defendant by this judicial power has long been recognized in local courts of criminal jurisdiction. In New York, where this trial occurred,[25] a statute specifically recognizing this power has been on the books since 1881. See N.Y. Crim. Procedure Law § 210.40 (substantially reenacting former § 671 of the N.Y. Code of Criminal Procedure). And in California, such a provision has been in effect since 1872. See Cal. Penal Code Ann. § 1385. See Appendix G, p. 1g, *infra*. In *People v. Superior Court of Marion County*, 446 P.2d 138, 72 Cal. Rptr, 330 (1968), the Supreme Court of California held that a post-verdict dismissal order pursuant to this procedure was not reviewable by mandamus. The majority opinion said (446 P.2d at 146):

> It would seem that, if anything, a court should have broader discretion to dismiss in furtherance of justice after the verdict than it should have during trial. After the verdict the judge has heard the evidence of the prosecution; whereas prior to the conclusion of the trial there is always the possi-

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[24] *Harris v. Nelson* did, of course, involve the Federal Rules of *Civil* Procedure and not the Criminal Rules. But 28 U.S.C. § 2072, which is the civil equivalent of 18 U.S.C. § 3771, contains an identical provision that "All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect."

[25] Prior to the adoption of the Federal Rules, of course, the local practice had more weight than it has today. See 6. Hughes, Federal Practice § 3730 (1931); *United States v. Kilpatrick*, 16 Fed. 765, 767 (W.D.N.C. 1883); *United States v. DeBolt*, 253 Fed. 78, 82 (S.D. Ohio 1918).

bility that in the absence of dismissal more evidence may be received.

The court below butressed its decision by relying on language in *Ex Parte United States,* 101 F.2d 870 (7th Cir., 1939), which this Court heard and affirmed by an equal division. 308 U.S. 519. In that case, the issue was whether—prior to the present Rule 29—a court had inherent power to reserve decision on a motion for judgment of acquittal until after verdict. Immediately following the language quoted by the court below was the following statement—which conflicts with the conclusion that district courts have no "inherent power": "In the absence of prohibitive legislation courts have inherent power to provide themselves with appropriate procedures required for the performance of their tasks." 101 F.2d at 878. The procedure followed here by Judge Weinstein was an "appropriate" one to achieve justice, and there is no "prohibitive" legislation forbidding it. It should be sustained by this Court.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 289—September Term, 1971.

(Argued October 14, 1971 Decided November 16, 1971.)

Docket No. 71-1942

UNITED STATES OF AMERICA,

Petitioner,

—against—

HONORABLE JACK B. WEINSTEIN, UNITED STATES DISTRICT JUDGE FOR THE EASTERN DISTRICT OF NEW YORK,

Respondent.

UNITED STATES OF AMERICA,

—against—

ALBERT GRUNBERGER,

Defendant.

Before:

FRIENDLY, *Chief Judge*, CLARK, *Associate Justice, Retired,** and KAUFMAN, *Circuit Judge.*

Petition by the United States for the issuance of *mandamus* to require a district judge to vacate an order dis-

* Of the Supreme Court of the United States, sitting by designation.

missing an indictment after having entered a judgment of conviction. Petition granted, with further consideration to be given to defendant's motion for a new trial.

EDWARD R. KORMAN, Assistant U. S. Attorney (Robert A. Morse, United States Attorney, Eastern District of New York, of Counsel), *for Petitioner.*

NATHAN LEWIN, Esq. (Miller, Cassidy, Larroca & Lewin, Esqs., Washington, D. C., of Counsel), *for Defendant Grunberger.*

FRIENDLY, *Chief Judge:*

A conscientious and ingenious district judge has here endeavored to provide opportunity for an appellate ruling on the nature of a trial judge's powers and responsibilities when a jury has found a defendant guilty on evidence which was facially sufficient but which the judge, for well articulated reasons, could not credit. This praiseworthy effort has presented us with problems of no little complexity.

I.

Albert Grunberger was convicted in February, 1969, after a jury trial before Judge Mishler in the District Court for the Eastern District of New York on three counts of having concealed, sold and facilitated the transportation of Swiss watches smuggled into the United States in violation of 18 U.S.C. §545 and one count of conspiring to do so.[1] On his appeal this court rejected a contention of insufficiency of the evidence for submission of the case to the jury, but reversed the conviction because

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1 The court dismissed a fifth count and the jury acquitted on a sixth.

of trial errors, and directed a new trial. *United States* v. *Grunberger*, 431 F.2d 1062 (1970). The opinion noted that, after the case had been argued oin appeal, Grunberger had moved in the district court for a new trial on the ground that he had newly discovered evidence proving that the 2,000 watch movements which the Government had claimed he had sold to Kalman Berger, the chief government witness, already belonged to Berger. In light of the disposition of the appeal we found a remand for consideration of this motion to be unnecessary since "the way is now open for appellant to introduce his newly discovered evidence" at the retrial, 431 F.2d at 1067, n. 8.

The Government's presentation at the second trial, before Judge Weinstein and a jury, differed from that in the first in a number of respects. At the first trial the Government's theory had been one of a simple "buy" transaction arranged by Berger at its request after he was assured of leniency in the smuggling prosecution then pending against him. Berger testified that he met with Grunberger for the first time on June 28, 1967, in a restaurant, and that a meeting was set for July 2 at Berger's home, at which time Grunberger would show him samples. When they met, Berger was shown the samples, the two men agreed on a price, and Grunberger described the watches as "smuggled." Their next meeting took place on July 17 when Grunberger drove Berger to a parking lot in Brooklyn, instructed him to leave a rented car there on July 19 and then go to a restaurant nearby to meet Grunberger. Berger testified that on July 19 he left the car at the lot, met Grunberger at the restaurant, gave Grunberger the keys to the car and the parking lot ticket, waited while Grunberger went off to arrange the transfer, and upon his return wrote Grunberger a check for $12,000 for the watches. Berger

then testified that he and the Customs agents examined about a half dozen of the 2000 watch movements contained in a shopping bag in the trunk of Berger's car and bearing the trade name COVA, and found these movements to be unsymboled. Berger also stated that, based upon his experience as a watch smuggler, the movements were wrapped in the way smuggled watches normally are, as opposed to the way legally imported movements would be packed. Customs agents testified that a record check of all domestic ports of entry failed to show that COVA watch movements had been legally imported. From this the jury could properly infer that these movements were illegally imported. Grunberger asserted that the movements belonged to Berger all along, although he conceded that he had been a party to the delivery to Berger of 2000 watch movements from one Herstig, a watchmaker whom Berger had hired to remove the mark "LEICA" and substitute the name COVA. See 431 F.2d at 1065.[2]

Prior to the second trial, examination of the watch movements demonstrated that "LEICA" had originally been inscribed on their face and that COVA had been superimposed. "LEICA" was Berger's trade name at least until just prior to the transaction here at issue. Berger was apparently informed of this either by a Customs agent or by the Assistant United States Attorney who handled the first trial. It was also shown that a large quantity of the "LEICA" faces had been manufactured in Germany in 1965 —upon whose order is unclear.

In light of the newly discovered evidence, the prosecution dismissed two counts of the indictment charging sale and conspiracy. The prosecutor's summation made plain the Government's position that even if the jury found no sale on July 19, they could find that Grunberger knowingly

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2 Herstig has fled the country; he now resides in Switzerland.

concealed and facilitated the transportation of illegally imported watches with knowledge that they were illegally imported.

The Government endeavored to avoid putting Berger back on the witness stand at the second trial. It called him only after the judge indicated that without his testimony the Government had failed to make a *prima facie* case that the movements were illegally imported and that Grunberger knew this.

The prosecutor examined Berger only briefly and most of the story came out on cross-examination. One variation was that whereas at the earlier trial Berger testified that his first meeting with Grunberger occurred on June 28, he now said that Grunberger unexpectedly showed up at his house on July 2, and, as he was on his way out, got into his car, showed him a number of samples, and asked whether Berger would be interested in purchasing a larger quantity. More important variations in Berger's story related to the watch movements themselves. Whereas at the first trial Berger testified that he simply agreed to make a swift purchase of a large quantity of movements, at the second trial, faced with the knowledge that in fact the recovered movements bore his long standing trade name "LEICA", he now asserted that he had ordered these from Grunberger some two and one-half years earlier, and these were the watches being delivered. As to the "LEICA" inscription, Berger now said that the samples Grunberger showed him at his home had this inscription, and that the watches recovered on July 19 also were so inscribed. In fact, however, all the watches recovered on July 19 showed the inscription COVA. Apparently Berger was not aware that the "LEICA" inscription had been found only after careful scientific examination disclosed that it underlay COVA, and Berger could thus not have seen it when the move-

ments were delivered. Berger stuck to his story that Grunberger had described the watches as smuggled. Customs agents testified somewhat inconclusively that although the earlier record check regarding COVA watches had failed to disclose their legal importation—a fact now insufficient to support an inference of illegal importation since the movements were found to have originally had "LEICA" inscribed on their faces—a partial record check of domestic ports of entry also failed to show the "LEICA" movements were legally imported.

Grunberger moved for acquittal under F.R.Cr.P. 29 both at the close of the Government's case and at the end of the entire case. Judge Weinstein denied both motions.[3] The jury, on March 29, 1971, found Grunberger guilty on the two counts for wilfully and fraudulently concealing and facilitating the transportation of 2,000 unsymboled Swiss watch movements, knowing the same to have been illegally imported into the United States.

After unsuccessfully renewing the motion for acquittal upon the bringing in of the verdict, Grunberger filed written motions for acquittal and, if that were denied, for a new trial, within the time permitted by F.R.Cr.P. 29(c) and 33. Argument was first heard on May 14, 1971. The judge then indicated an intention to adhere to his previ-

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3 In denying the first motion, after the inconsistency between Berger's stories at the two trials had been thoroughly exploited by defense counsel, the judge said: "I am not going to grant the motion on the ground that this man is inherently incredible. . . . I think a reasonable juror can conclude beyond a reasonable doubt that this man is telling the truth on his [very likely 'in its'] essential elements. . . . I myself would not believe him and would not convict anybody, but I can't say that a reasonable juror might not and I am going to allow it to go to the jury, if that is all there is." In refusing to grant the motion for acquittal at the end of the case, the judge said: "I must say, I am not convinced by either Berger's testimony or the defendant's testimony. I suspect very strongly that the—that we still haven't gotten the truth from either of these people, but we will have to leave that to the jury."

ous rulings with respect to the motion for acquittal; the hearing was adjourned so that the Government might file a brief.

On June 10 Grunberger came on for sentence. The judge began by saying:

> Continuing to reserve decision on the main motions, I sentence the defendant to one year imprisonment but suspend execution of sentence and place him on probation for a three-year period. In addition I sentence him to a fine of ten thousand dollars. The execution of the fine may be stayed for thirty days from that payment.

Pursuant to this the judge at some time signed a judgment of conviction, which was duly entered by the clerk. He then continued:

> Now, I will address myself to the question of the motions.
>
> Pursuant to the authority that I have under Rule 33, I would grant a new trial to this defendant as required in the interest of justice based upon my hearing of Mr. Berger and a comparison of what he said in this trial and what he said in the other trial, and I believe that his statements were incredible, and that he is not worthy of belief. This, however, was a matter for the jury, and if that were the only reason for granting a new trial, I probably would allow the verdict to stand, but I think that his testimony plus the physical evidence in the case as determined from inspection of the records and dials and the like and the German manufacture of the dials, and the changes in the story of Mr. Berger and the inconsistencies within the story, as well as I think the strong feeling I get

from the record that the government agency involved, and I do not criticize the agency for believing that this defendant is a well-known smuggler, but that agency had to a greater degree than is normally acceptable, suggested to Mr. Berger its desire to see that this defendant was convicted and take into account the suggestibility of Mr. Berger and his incapacity to distinguish between fact and falsity when his own interests are at stake, and, I think, the danger of a miscarriage of justice was too great in this case.

With all those circumstances plus others I won't advert to, it seems to me to come within the specific terms of Rule 33, that it requires a grant of a new trial in the interests of justice.

In this case, however, it seems to me, a new trial would not serve any useful purpose because I believe that the government has presented this evidence it now has as forcibly as it could be presented to this jury. I do not believe that a retrial would serve any purpose at all except to exhaust the government to require the expenditure of substantially more public revenue, and it certainly wouldn't serve the defendant's purposes, because I don't see how the defendant can make a stronger defense at the second trial.

Accordingly, I am going to dismiss the indictment.

Now, I have serious doubts about my power to do so, which is why I sentenced this defendant in the first place.

The judge thereupon signed an order, also dated June 10, 1971, dismissing the indictment.

After waiting until October 5, a delay occasioned, as it tells us, by the need for obtaining the approval of the

Solicitor General,[4] the Government filed a petition with this court for issuance of a writ of *mandamus* to direct Judge Weinstein to vacate his order dismissing the indictment on the ground that he lacked jurisdiction to do so. In accordance with F.R.A.P. 21(b), we directed that an answer be filed and that the petition be set for early argument. In a letter to the clerk, the judge declined the opportunity to answer but gave further aid in defining the issue by saying:

> As indicated in the records of this Court, the action challenged in the petition was designed to permit the United States Government to seek review of this Court's decision in *United States* v. *Grunberger*, 67-CR-303. That decision raised the issue of whether there are instances where, considering the totality of the circumstances, based upon articulated reasons, and in the interest of justice, a criminal proceeding should be terminated in favor of the accused even though no specific error warrants a new trial or dismissal of the indictment.

Grunberger's counsel moved to dismiss the petition for want of jurisdiction; the document filed by him also dealt with the merits. After the argument, with our permission, both the Government and defense counsel filed further briefs.

II.

If one could decide the point simply as a matter of good sense, it would seem almost too clear to require discussion

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4 Grunberger's exceedingly able counsel who, as a former member of the Solicitor General's office, was familiar with the office's procedures and was aware of the plan of the United States Attorney to seek *mandamus*, endeavored, properly but unsuccessfully, to persuade the Solicitor General not to grant approval.

that when a litigant claims that a lower court has taken action beyond its jurisdiction, as opposed to simply erroneous action within its jurisdiction, see *Will* v. *United States*, 389 U.S. 90, 97 n. 5, 98 n. 6 (1967), the court that would normally review decisions in the field in question should have power to require the lower court to set matters right. Except insofar as the double jeopardy clause might require otherwise; this would be equally true when the action was taken in a criminal case, as would be quite clear if a judge, months after entering a judgment of conviction, should, *sua sponte*, direct an acquittal or order an indictment to be dismissed. Compare *United States* v. *Smith*, 331 U.S. 469 (1947). The Government asserts that, under the authorities, notably this court's decision in *United States* v. *Dooling*, 406 F.2d 192 (2 Cir.), *cert. denied sub nom. Persico* v. *United States*, 395 U.S. 911 (1969), our power to do this under 28 U.S.C. §1651 is just that plain. While the *Dooling* case is indeed persuasive authority for the Government, we believe the importance of the issue deserves full examination.

In order to clear the decks, we begin by saying that, despite the earnest contention of Grunberger's counsel that *United States* v. *Sisson*, 399 U.S. 267 (1970), destroys the underpinnings of *Dooling*, we regard the *Sisson* decision as largely irrelevant to the issue here under discussion. The holding of *Sisson* was that when a district judge had released a defendant, found guilty by a jury under an indictment valid upon its face, because of the judge's belief that, on the evidence adduced at trial, application of the Selective Service Act to the defendant would violate the First and Fifth Amendments, this was not "a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based upon the invalidity or construction of the statute upon which the

indictment or information is founded," within the relevant provision of the Criminal Appeals Act, 18 U.S.C. §3731 (1964), *subsequently amended*, 18 U.S.C. §3731 (1971), even though the judge had characterized it as one. The Court was convinced that, despite its contrary form, "the decision was in fact an acquittal rendered by the trial court after the jury's verdict of guilty." 399 U.S. 288.[5] The Government did not and, under the clear language of F.R.Cr.P. 29, could not successfully have claimed that a post-verdict but pre-judgment direction of acquittal, such as Judge Wyzanski's in *Sisson*, was beyond his jurisdiction. Moreover, even if it had been founded on an erroneous view of his power, the double jeopardy clause would protect the defendant against a retrial. *Fong Foo* v. *United States*, 369 U.S. 141 (1962).

The problem with respect to our power to issue *mandamus* arises from the wording of the "all writs" statute, 28 U.S.C. §1651(a). This provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

The argument is that since, in light of the order dismissing the indictment, the defendant had taken no appeal from the judgment of conviction[6] and the order is not appealable by

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5 This passage occurs in Part IIC of Mr. Justice Harlan's opinion which alone commanded a majority. However, we do not find elsewhere in his opinion or, for that matter, in the dissents, anything that assists Grunberger on the question of the power of a court of appeals to issue *mandamus* to vacate an order wrongly entered by a district court.

6 The United States appealed on July 9, 1971, from the order dismissing the indictment; on July 26 the defendant cross-appealed from the same order to the extent that it "failed to enter a judgment of acquittal at the conclusion of the government's case and at the close of all the evidence." These appeals, however, are not of the same type as in *United*

the Government under the pre-1971 version of 18 U.S.C. §3731; which is here controlling,[7] the issuance of *mandamus* cannot be in aid of our appellate jurisdiction.

The starting point for discussion is Chief Judge Magruder's scholarly opinion in *In re Josephson*, 218 F.2d 175, 177-80 (1 Cir. 1954). He there traced the history leading up to the present form of the all-writs statute: The Judiciary Act of 1789 expressly endowed the Supreme Court with power "to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction, and writs of *mandamus*, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States," §13, and further provided that "all the before-mentioned courts of the United States, shall have power to issue writs of *scire facias, habeas corpus,* and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law," §14. 1 Stat. 80-82. The Supreme Court's prohibition and *mandamus* powers (with a modification of the latter to conform to *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803) which is not here material) were con-

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States v. *Mayer*, 235 U.S. 55 (1914), where the Court found that defendant's appeal from a judgment of conviction both cut off the district court's power to vacate the conviction and order a new trial, and provided a basis for the circuit court to issue an extraordinary writ in aid of its appellate jurisdiction. The Court reasoned that the district court would frustrate the then pending appeal if it vacated the judgment of conviction. Here, the appeal and limited cross-appeal are from the district court's final order, and no prior appeal will be frustrated.

7 The Supreme Court has construed the pre-1971 Criminal Appeals Act—apparently with respect to the courts of appeals as well as to itself—"as confining the Government's right to appeal—except for motions in arrest of judgment—to situations in which a jury has not been impaneled, even though there are cases in which a defendant might constitutionally be retried if appeals were allowed after jeopardy has attached." *United States* v. *Sisson*, 399 U.S. 267, 302-03 (1970).

tinued by Rev. Stat. §688 (1878), whereas the all writs section, still containing the limitation "which may be necessary for the exercise of their respective jurisdiction," found its way into Rev. Stat. §716 (1878). The dichotomy was continued in §§234 (Supreme Court) and 262 (all courts) of the Judicial Code of 1911. 36 Stat. 1156, 1162. The two provisions were melded for the first time in 1948. With characteristic inscrutability, the Reviser, in a note to what is now 28 U.S.C. §1651, stated that the special provisions of §234 with respect to the Supreme Court's powers of prohibition and *mandamus* "were omitted as unnecessary in view of the revised section," and §234 was expressly repealed, 62 Stat. 996.

The conclusions Chief Judge Magruder drew from this history were "that decisions of the Supreme Court of the United States, at least prior to 1948, supporting the issuance, *by that Court*, of a writ of *mandamus* directed to a lower federal court, may not safely be relied upon by an intermediate court of appeals as authority for the issuance by the latter court of a writ of *mandamus* directed to a district court within the circuit" since "the Supreme Court might have been exercising a different sort of power from the strictly auxiliary power" given to the courts of appeals, 218 F.2d at 179,[8] and, inferentially, that the 1948 Congress meant to withdraw any such broader power from the Supreme Court.

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8 This statement did not take full account of the fact that in *Ex parte United States*, 287 U.S. 241, 245-49 (1932), upholding its power to issue mandamus to a district court to issue a bench warrant for the arrest of an indicted defendant, the Supreme Court expressly relied on its power under §262 of the 1911 Code to issue all writs "which may be necessary for the exercise of their respective jurisdictions," rather than the power conferred by §234. Since a defendant who had avoided arrest and trial would never have appealed and the Government could not, the case seems to constitute authority for a broad reading of the quoted phrase, and the Reviser may have had this in mind.

While this is a possible reading of what the 1948 Congress did, we find it hard to believe, in the absence of better evidence than the Reviser's Note, that Congress meant to curtail a power the Supreme Court had possessed for 159 years. A decision of the Court not yet rendered at the time of the *Josephson* opinion has emphasized that "no changes of law or policy are to be presumed from changes of language in the [1948] revision unless an intent to make such changes is clearly expressed." *Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U.S. 222, 227 (1957). See also *Madruga* v. *Superior Court of California*, 346 U.S. 556, 560 n. 12 (1954). To be sure, this is not altogether dispositive here, for the 1948 revision must be read either as imposing a new limit on the *mandamus* power of the Supreme Court or as determining that both it and the courts of appeals have *mandamus* power over lower courts of the same breadth which the first Congress expressly conferred on the Supreme Court by §13 of the First Judiciary Act—in other words, that the phrase "in aid of their respective jurisdictions" should not be read so as to prohibit them from vacating orders, in actions generally subject to their supervision, that were beyond the power of the lower court to make, even though in the particular case there was no frustration of an appeal. Although the Court has not spoken directly to the point, we construe its post-1948 decisions as indicating its belief that, of the two readings, neither of which is wholly satisfactory, the latter more probably represents what Congress intended[9]—or, at least would have preferred if the issue had been brought sharply to its attention.

The first such indication is *La Buy* v. *Howes Leather Co.*, 352 U.S. 249 (1957). The Court there stated its belief "that

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9 This is also supported by *Ex parte United States*, *supra*, 287 U.S. 241, discussed in the preceding footnote.

supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system. The All Writs Act confers on the Courts of Appeals the discretionary power to issue writs of *mandamus* in the exceptional circumstances existing here," 352 U.S. at 259-60. While this must be read in connection with an earlier statement, "Since the Court of Appeals could at some stage of the [private] antitrust proceedings entertain appeals in these cases, it has power in proper circumstances, as here, to issue writs of *mandamus* reaching them," 352 U.S. at 255, we also find significance in the majority's ignoring the dissent's strong advocacy of the views expressed by Chief Judge Magruder in *In re Josephson, supra.*

We find another such indication in *Fong Foo* v. *United States, supra.* In that case the district judge had directed an acquittal in a criminal prosecution before the Government had completed its case. The First Circuit issued *mandamus* requiring him to vacate the order. In justification of its power to do this, it cited *Ex parte United States, supra,* 287 U.S. 241, see note 8, *supra,* and distinguished *In re Josephson, supra,* on that basis, *In re United States,* 286 F.2d 556, 563-64 (1961). The Supreme Court based its reversal solely on the ground that the double jeopardy clause prohibited a retrial;[10] none of the Justices questioned the validity of the view expressed by the Court of Appeals with respect to its powers under the "all-writs" statute, although disagreement on that score would have afforded an easy ground for reversal.

The final datum is *Will* v. *United States,* 389 U.S. 90 (1967), where the Court reversed an order of a court of

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10 There is no similar problem here. Vacating the order dismissing the indictment would simply leave the judgment of conviction unimpaired, subject to whatever remedies Grunberger may have with respect to it.

appeals granting *mandamus* to require a district judge to strike a portion of his order directing the Government to file a bill of particulars in a criminal case. Although the Court said in a footnote, 389 U.S. at 95 n. 4, "It is likewise unnecessary for us to reach the question whether the writ in the circumstances of this case may be said to issue in aid of the Court of Appeals' appellate jurisdiction," other statements in the opinion indicate a rather broad view of the power of the courts of appeals to issue *mandamus*, although advocating a sparing use of it, especially in criminal cases. Thus, after stating that "[*m*]*andamus*, of course, may never be employed as a substitute for appeal in derogation of these clear policies" [against appeal by the Government in criminal cases], the Court added that "[t]his is not to say that *mandamus* may never be used to review procedural orders in criminal cases. It has been invoked successfully where the action of the trial court totally deprived the Government of its right to initiate a prosecution, *Ex parte United States*, 287 U.S. 241 (1932), and where the court overreached its judicial power to deny the Government the rightful fruits of a valid conviction, *Ex parte United States*, 242 U.S. 27 (1916)." 389 U.S. at 97-98.[11] Also, while the Court vacated the writ, it remanded the case to the court of appeals to enable that court to "give a reasoned exposition of the basis for its action," 389 U.S. at 107. This disposition would not have been appropriate if the Supreme Court was convinced there was a jurisdictional bar to issuance of the writ except in cases where an existing or potential appeal would be frustrated.

This examination does not end our inquiry, however, since we are well aware that *mandamus* may not be employed to circumvent the limitations of the Criminal Ap-

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11 Citation of the 1932 case would indicate that the Court was not persuaded by the distinction drawn by Chief Judge Magruder in *Josephson*.

peals Act. See *United States* v. *Will*, *supra*, at 96-97. Although, as we determine below, the order we review here is not in substance a judgment of acquittal as was the order reviewed in *Sisson*, it may well be that Judge Weinstein's order is not appealable under the pre-1971 Criminal Appeals Act. See note 7, *supra*. But, as we also determine below, Judge Weinstein, unlike Judge Wyzanski in *Sisson*, acted beyond his jurisdiction. Under these circumstances, the interests of the administration of the system of criminal justice, as well as the limitations of the Criminal Appeals Act which are founded in the policies behind the double-jeopardy prohibition, are at stake. Chief Judge Lumbard observed in *Dooling*, *supra*, at 198:

> We think it equally true that the fact that the government may have no right of appeal does not act as a conclusive bar to the issuance of *mandamus* in its favor. Certainly the restrictions placed upon the the government's right to appeal do reflect important policy judgments by Congress, at their core protecting the right against double jeopardy, which must not be undermined by casual resort to *mandamus*. But circumstances can arise which present a compelling need for issuance of *mandamus* in order to further important countervailing interests. Here we find this need in our responsibility for preventing gross disruption in the administration of criminal justice, and we act pursuant to our supervisory power over the district courts.

The issuance of the writ in this proceeding will not subject Grunberger to retrial in violation of his right to be protected against double jeopardy.

We therefore conclude on the basis of the foregoing review, as well as on the authority of *United States* v.

Dooling, supra, that we have discretionary jurisdiction to issue the writ if the order dismissing the indictment was beyond the judge's power and inconsistent with "accepted principles and usages of law."

III.

Defendant's principal argument on the merits is that although the judge characterized his order as one dismissing the indictment, in truth and fact it was a judgment of acquittal. We have the gravest doubt whether the judge's undoubted power to set aside a verdict and enter a judgment of acquittal, F.R.Cr.P. 29(c), can survive the entry of a *judgment* of conviction; the two actions seem antithetical. Beyond that, however, to characterize the judge's order dismissing the indictment as one of acquittal would be to attribute to him a purpose he repeatedly and rightly disclaimed. We have already cited numerous instances of such disclaimers; there are many more. Beyond that the judge was entirely correct in acknowledging that he had no "right" to direct acquittal because of disbelief of the prosecution's witness, even though before entering judgment of conviction he had the "power" to do so.[12] F.R.Cr.P. 29(a), which abolished motions for directed verdicts and substituted motions for judgment of acquittal, directs the granting of such motions "if the evidence is insufficient to sustain a conviction. . . ." Grunberger's own testimony sufficed to show that he had concealed and facilitated the transportation

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12 While the antinomy does not precisely fit the famous Hohfeldian formulation, the distinction is nonetheless clear. The district judge in *Fong Foo* had the "power" to give the defendants immunity for all time by directing an acquittal because our legal system had placed him in charge of the trial, but none of the reviewing judges thought that under the facts of that case he had the "right" to do so in the sense of acting in accordance with applicable rules of law. See also *Will* v. *United States*, 389 U.S. 90, 98 n. 6 (1967).

of the watch movements, albeit, on his view, innocently. The remaining elements of the crime were that the movements were in fact smuggled and that Grunberger knew them to be. On those elements Berger testified that Grunberger characterized the movements as "smuggled"—clearly enough to establish Grunberger's guilty knowledge if the jury believed him—and that the movements were wrapped in an illicit manner—which when combined with other circumstantial evidence such as the surreptitious conduct of the parties, Berger's past dealings in smuggled watches, and the relationship between Grunberger, Herstig, and Berger, was more than sufficient to show illegal importation. See *United States* v. *Masiello*, 235 F.2d 279, 289 (2 Cir.) (concurring opinion of Frank, *J.*), *cert. denied sub nom. Stickel* v. *United States*, 352 U.S. 882 (1956). To be sure, there were unusally strong grounds for not believing Berger. But that decision was the jury's function, not the judge's, as he reiterated time and again. The maxim *"Falsus in uno, falsus in omnibus"* has been well said to be itself "absolutely false as a maxim of life." 3A Wigmore, Evidence §1008 at 982 (Chadbourn rev. 1970). The correct principle was stated by Judge Campbell more than a century ago:

> There has never been any positive rule of law which excluded evidence from consideration entirely, on account of the wilful falsehood of a witness as to some portions of his testimony. Such disregard of his oath is enough to justify the belief that the witness is capable of any amount of falsification, and to make it no more than prudent to regard all that he says with strong suspicion, and to place no reliance on his mere statements. But when testimony is once before the jury, the weight and credibility of every portion of it is for them, and not for the Court to determine.

Knowles v. *People*, 15 Mich. 408, 412 (1867). And the Supreme Court has stated that: "The established safeguards of the Anglo-American legal system leave the veracity of a witness to be tested by cross-examination, and the credibility of his testimony to be determined by a properly instructed jury." *Hoffa* v. *United States*, 385 U.S. 293, 311 (1966).[13]

In light of this, defendant's reliance on the *Sisson* holding that an appellate court will look at what a district court did rather than at what it said it was doing, 399 U.S. at 270, is misplaced. What the judge did in *Sisson* was entirely plain. He refused to enter judgment on a verdict because, in his view, the Constitution prohibited him from doing so. This was, in truth and fact, a judgment of acquittal; the judge believed that, with the evidence taken in the light most favorable to the Government, it still would not support a conviction. The Supreme Court held that such a judgment of acquittal could not be transformed into the rather technical concept of an arrest of judgment, to wit, "the act of a trial judge refusing to enter judgment on the verdict because of an error appearing on the face of the record," 369 U.S. at 280, simply by his calling it such. It would be a far cry from this to hold that the order here in question was a judgment of acquittal, which the judge repeatedly said he did not intend to enter, could not rightly have entered and, in all probability, had lost the power to enter.

IV.

We thus reach the question Judge Weinstein wished us to consider, namely, whether a judge has power to termi-

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13 When proof with respect to an essential element of the crime is circumstantial, the judge may have a larger role with respect to sufficiency, since he must determine whether the web of inferences the prosecution seeks to have the jury draw has been spun too far.

nate a criminal proceeding in favor of the accused even though he has felt bound by applicable rules of law to enter a judgment of conviction on a verdict of guilty.

It is plain that no Rule of Federal Criminal Procedure confers any such power. We have already discussed Rule 29 and shown its inapplicability. The other pertinent provision is Rule 33 relating to the grant of a new trial. We have no doubt that, on Grunberger's timely motion, the judge had power to grant a new trial if he thought, in the language of the Rule, that this was "required in the interest of justice" even though, in his phrase, "no specific error" warranted this.[14] But admittedly no Rule gives the judge an overriding power to terminate a criminal prosecution in which the Government's evidence has passed the test of legal sufficiency simply because he thinks that course would be most consonant with the interests of justice.

We believe the failure of the Rules to bestow such a power precludes its exercise. The Federal Rules of Crimi-

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14 We do not join in the judge's forecast that the granting of a new trial would doom the defendant and the Government to an infinite regression. Apart from the possibilities that either the Government or Grunberger might come up with wholly new evidence, a third trial seems likely to differ from the second in at least two respects. On the one hand, it is more than likely that at a third trial the Customs Bureau will have completed its record check with respect to legal importation of movements bearing the name "LEICA". Assuming that the results of this check reasonably support an inference of illegal importation, Berger's testimony would be unnecessary on this element of the case. On the other side, Grunberger's counsel would not be handicapped at a third trial, as he apparently was at the second, by the Government's delay in delivering certain §3500 material. If Grunberger is acquitted, that will end the matter. On the other hand, if a third jury were to find him guilty, we should suppose any judge would hesitate a long time before concluding that the interests of justice required still another trial. The two juries that have returned guilty verdicts could well have been influenced by disbelief in Grunberger's own story, see 431 F.2d at 1065, which has aspects of improbability. *Cf. Dyer* v. *McDougall*, 201 F.2d 265, 268-69 (2 Cir. 1952) (L. Hand, *J.*). Indeed, as our earlier quotation indicates, see note 3, *supra*, the judge himself doubted that anyone at this trial was telling the whole truth.

nal Procedure were designed to provide a uniform set of procedures to govern criminal cases within the federal courts consistent with the requirments of justice and sound administration. Where previously recognized powers were thought appropriate for inclusion in the rules, this was expressly done. Most relevant for our purposes, the three rules providing for termination of a prosecution once a jury has been impaneled[15] are all embodiments of such powers: Rule 29 is an expression of the common law power to acquit for insufficiency of the evidence; Rule 34, arrest of judgment, has recently been interpreted as exactly carrying forward its common law predecessor, *United States* v. *Sisson, supra;* and Rule 48(b), dismissal by the court for unnecessary delay, was said by the Advisory Committee to be "a restatement of inherent power to dismiss a case for want of prosecution," see also *United States* v. *Research Foundation, Inc.*, 155 F. Supp. 650 (S.D.N.Y. 1957). Moreover, the authority for the Criminal Rules, now 18 U.S.C. §3771, specifically provides that "All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." Thus, even if some other source had given a judge authorization to terminate a prosecution on the basis here suggested, this would be terminated in an area which the Rules have occupied to such an extent as here. If the interests of justice

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15 Rule 12, dealing with pre-trial motions, was the subject of great debate in *United States* v. *Mersky*, 361 U.S. 431 (1960). There, Mr. Justice Brennan in his concurring opinion, 361 U.S. at 441, and Mr. Justice Stewart in his dissent, 361 U.S. at 453, joined issue on the effect of Rule 12 on the historic "motion in bar." Mr. Justice Brennan argued that Rule 12 swept away the common law motion in bar in favor of a broader rule. Mr. Justice Stewart argued that Rule 12 merely carried forward the existing federal law relating to a motion in bar which itself was somewhat broader than its common law predecessor. But both Justices focused on what they found to be the proper interpretation of the Rule, and neither recognized any inherent power to go beyond whatever the proper interpretation was found to be.

would be served by bestowing so broad a power as that here invoked, a matter on which reasonable minds may differ, see 8 Moore, Federal Practice (Cipes) ¶29.05 at 29-13, the Supreme Court's power to amend the Rules is adequate to that end.

Apart from what we regard as the preclusive effect of the silence of the Rules, we have not been pointed to any precedent for such an inherent power. In England the judge could not even direct a verdict of acquittal for legal insufficiency of the evidence; his only power, at least in cases involving felonies, was to recommend royal clemency, which was granted as a matter of course. See, *e.g.*, 2 Hale's History of the Pleas of the Crown 294-95, 308, 412 (2d ed. 1800); 1 Chitty, Criminal Law 508, 532 (1819); 1 Stephen, History of the Criminal Law of England 312-13 (1883); Thayer, Preliminary Treatise on Evidence at the Common Law 175 (1898); 1 Radzinowicz, A History of English Criminal Law 110 (1948). According to the same authorities, a very limited power to order a new trial after a conviction was recognized, at least after the 1660's, but then only in cases involving misdemeanors. In *Ex parte United States,* 101 F.2d 870 (7 Cir.), *aff'd by an equally divided court sub nom. United States* v. *Stone,* 308 U.S. 519 (1939), it was held, apparently for the first time, that a federal judge who had reserved decision on a motion to direct a verdict of acquittal could enter judgment notwithstanding a verdict of guilty. This holding was based on the alternative grounds that this power was a permissible adaptation of English practice to American conditions, 101 F.2d at 877, and that "the trial court possesses inherent power to render a judgment of dismissal pursuant to the reservation of an issue of law, when deemed essential by it to the administration of justice." 101 F.2d at 878. The court made clear that when it spoke of "an issue of law,"

it was referring to "the judicial function of determining the legal sufficiency of the evidence" *id.*, not a general view on the part of the judge that, even though the evidence was legally sufficient, the jury should not have credited it.[16] The Advisor's Note to the original form of Rule 29 states that Rule 29(b) was adopted to sanction the practice approved in the case just cited; the note to Rule 29(c) adopted in 1966, shows that this was intended to permit a motion for a judgment of acquittal to "be made after discharge of the jury whether or not a motion was made before submission to the jury"—not to broaden the grounds on which a verdict might be set aside. If all this was thought needed to give the judge the power to acquit for legal insufficiency, it can scarcely be that he had a much broader power all along.

V.

Decision that, for the reasons stated in sections III and IV of this opinion, we should direct that the order dismissing the indictment be vacated as beyond the district court's jurisdiction leaves us with a further question of disposition. Because of his belief that the interests of justice required him to follow a course which we have held to lie beyond his power, the judge, as we read his decision, did not pass on the timely motion for a new trial, which he could well have wished to grant rather than permit the verdict to stand. Almost certainly Grunberger will now ask him to do that.

If we were to look only at the language of F.R.Cr.P. 33, we would perceive no obstacle to a judge's granting a timely motion for a new trial, although made only on the

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16 Indeed, the court characterized the principle, "Ad questionem facti non respondent judices; ad questionem legis non respondent juratores," as having been "enshrined in our American Constitution."

ground that this "is required in the interest of justice" rather than on that of newly discovered evidence, even after he had entered a judgment of conviction. And the precise holding of *United States* v. *Smith, supra,* 331 U.S. 469, namely, that after the judge had denied such a motion and both the judgment of conviction and the order of denial had been affirmed on appeal, he could not thereafter *sua sponte* direct a new trial in the interest of justice, does not dictate otherwise. However, one of the several grounds for the decision in that case was that a "Question of finality would be raised if the trial court, while formally denying the motion for a new trial on the record, reserves the right to change its mind after the opinion of an appellate court has been elicited." 331 U.S. at 474. Hence, it can be argued with some force that the judge's power to grant a timely motion for a new trial in the interest of justice lapses when an appeal has been taken or the time for doing this has expired. Cf. *United States* v. *Froehlich,* 166 F.2d 84 (2 Cir. 1948).

We do not think this presents a difficulty if, as we read the record, the judge did not actually deny the motion for a new trial but rather left it undetermined because of his desire to give Grunberger something better. No appeal from the judgment of conviction has been taken, and none needed to be since a timely motion for a new trial extends the time for an appeal until ten days after an order of denial, F.R.A.P. 4(b). Our vacating the order dismissing the indictment thus leaves Judge Weinstein free to act upon Grunberger's motion for a new trial.

Petition granted.

APPENDIX B

[Caption Omitted in Printing]

A petition for a rehearing having been filed herein by counsel for the defendant, Albert Grunberger,

Upon consideration thereof, it is

Ordered that said peition be and it hereby is denied.

Henry J. Friendly, Chief Judge

/s/ Tom C. Clark

Tom C. Clark, Associate Justice

Irving R. Kaufman, U.S.C.J.

December 20, 1971

[Caption Omitted in Printing]

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant. Albert Grunberger, and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

Chief Judge

December 20, 1971.

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APPENDIX C

JUDGMENT AND COMMITMENT (Rev. 2-64) Cr. Form No. 35a

United States District Court

FOR THE

EASTERN DISTRICT OF NEW YORK

United States of America

v.

ALBERT GRUNBERGER

No. 67 CR-303

On this 10th day of JUNE, 1971 came the attorney for the government and the defendant appeared in person and with counsel

IT IS ADJUDGED that the defendant upon ~~his plea of~~ a verdict of guilty

has been convicted of the offense of violating T-18, U.S.Code, Secs. 545 & 2, in that on or about July 19, 1967, the defendant, with another, wilfully and fraudulently facilitated the transportation after importation into the U.S. contrary to law, approximately 2,000 unsymboled Swiss watch movements knowing the same to have been imported into the U.S. contrary to law

as charged in counts 1 and 2

and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of 1 year -execution of sentence is suspended and the defendant is placed on probation for a period of 3 years on counts 1 and 2, subject to the standard conditions of probation as set forth in the standing order of this court dated October 13, 1964. Defendant is fined $10,000.00 on each of counts 1 and 2 for a total fine of $10,000.00 - sentences to run concurrently. Stay of execution for payment of fine is granted for 30 days.

~~IT IS ADJUDGED that~~

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

The Court recommends commitment to

S/ JACK B. Weinstein
United States District Judge.

Clerk.

A True Copy. Certified this 10 day of JUNE 1971

(Signed) Lewis Orgel *Clerk.* (By) Ralph M. Sauro *Deputy Clerk.*

Exhibit

2c

FH 671556

FILED [illegible]

IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.

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TIME A.M. [illegible]

P.M.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-v-

ALBERT GRUNBERGER

Defendant

ORDER OF DISMISSAL

67 CR-303

The ~~United States Attorney~~ counsel for the defendant, Nathan Lewin, Esq., having appeared in open court and having moved orally to dismiss the ~~information~~ indictment herein, and the said motion having been granted, it is

Ordered that the ~~information~~ indictment is hereby dismissed.

Dated: Brooklyn, New York
June 10, 1971

U.S.D.J.

Exhibit 2

APPENDIX D

In the United States Court of Appeals For the Seventh Circuit

SEPTEMBER TERM, 1971 — SEPTEMBER SESSION, 1971

No. 18396

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

RICHARD VICTOR PONTO,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
69 CR 313
HON. JAMES B. PARSONS, *Judge.*
On Rehearing *En Banc.*

No. 18874

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

RAYMOND J. GROCHOWSKI,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin.
69 CR 149
HON. JOHN W. REYNOLDS, *Judge.*
On Rehearing *En Banc.*

Approved: December 14, 1971
Issued: December 28, 1971

Before SWYGERT, *Chief Judge,* HASTINGS, *Senior Circuit Judge,* and KILEY, FAIRCHILD, CUMMINGS, KERNER, PELL, STEVENS and SPRECHER, *Circuit Judges.*

KERNER, *Circuit Judge.*

A.

UNITED STATES OF AMERICA v. RICHARD VICTOR PONTO.

The defendant, Richard Ponto, was indicted for refusing to submit to induction into the Armed Forces: 50 U.S.C. App. §462. Prior to trial, the district court granted the defendant's motion "to dismiss the indictment or for a directed judgment of acquittal." The government appealed.

A three-judge panel of this court, one judge dissenting, ruled that the government did not possess the authority to appeal under 18 U.S.C. §3731[1] and dismissed the case for lack of appellate jurisdiction. *United States* v. *Ponto* (No. 18396, slip op. Jul. 7, 1971), ... F. 2d ..... (7th Cir. 1971). Subsequently, the government's petition for a rehearing *en banc* was granted.[2] Upon consideration by the entire court, we affirm the panel's opinion that the government is barred from appeal and dismiss the appeal for lack of jurisdiction.

The facts of the case were adequately stated in the panel's opinion, *United States* v. *Ponto, supra*, and we shall avoid unnecessary repetition.

The issue reargued *en banc* concerned the interpretation of the portion of 18 U.S.C. §3731,[3] which provides:

> An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases in the following instances:

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[1] The Act has been amended in the Omnibus Crime Control Act of 1970, §14(a), 84 Stat. 1890 (1971). The new provisions apply to indictments issued after January 2, 1971. Ponto was indicted in 1969.

[2] This case was consolidated for oral argument along with a rehearing of *United States* v. *Grochowski* (No. 18874, slip. op. Jul. 27, 1971), ... F. 2d ..... (7th Cir. 1971), and the original hearing in *United States* v. *Gustavson*, No. 18315. All cases involved the same jurisdictional question under §3731.

[3] The panel in *Ponto* also decided that the order of the district court could not be appealed to the Supreme Court under the "motion in bar" provision of §3731. *Ponto* at pp. 6, 7 (slip op.). Since the government's petition for rehearing did not contest this ground and since it was not argued at the rehearing *en banc*, we do not deem it necessary to reconsider it here.

> From a decision or judgment setting aside, or dismissing any indictment or information or any count thereof, except where a direct appeal to the Supreme Court of the United States is provided by this section.

I.

The panel in *Ponto* held that this portion of §3731 permits a government appeal to this court only when the dismissal of a criminal case by a district court is based on a defect in the indictment or information, or in the institution of the prosecution. For this holding, the panel relied heavily on an *en banc* decision of the Ninth Circuit, *United States* v. *Apex Distributing Co.*, 270 F. 2d 747 (9th Cir. 1959). In *Apex*, the Ninth Circuit, after an exhaustive exposition of the legislative history of §3731, concluded, as we do here, that paragraph 6 reached some, but not all, orders dismissing indictments.

To understand the meaning of §3731, a short review of the Act's legislative history is in order. Prior to 1907, the government had no right to appeal from any criminal case. In 1907, Congress permitted appeal by the government to the Supreme Court in certain narrowly defined instances.[4] No government appeal was permitted to a court of appeals. 34 Stat. 1246. *United States* v. *Sisson*, 399 U.S. 267, 294 (1970); *Carroll* v. *United States*, 354 U.S. 394, 402 n. 11 (1957).

In 1942, Congress permitted the government to appeal to the court of appeals "[f]rom a decision or judgment quashing, setting aside, or sustaining a demurrer or plea in abatement to any indictment or information, ..." Act of May 9, 1942, c. 295, §1, 56 Stat. 271, codified as former 18 U.S.C. §682 (1946 ed.). The Report of the Judiciary Committee explained the purpose of this provision:

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[4] The 1907 Act allowed the United States to appeal:

> From a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded.
>
> From a decision arresting a judgment of conviction for insufficiency of the indictment, where such decision is based upon the invalidity or construction of the statute upon which the indictment is founded.
>
> From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy.

> . . . your committee feels that the Government should have the right to appeal to the circuit court of appeals from the district court from decisions on demurrers or pleas in abatement to indictments or informations in cases involving the sufficiency of the allegations in the indictments or informations in the same manner in which the Government may now appeal from decisions or demurrers to indictments direct to the Supreme Court in those cases involving the validity of a statute or the construction of a statute.
>
> U.S. Code Cong. Serv. 77th Cong., 2d Sess. 1942, pp. 487-88.

The 1942 provision, then, permitted government appeal from a decision responsive to a demurrer or plea in abatement to the indictment. Under common law, a demurrer was raised by a criminal defendant to question the legal sufficiency of the indictment. 2 Orfield, *Criminal Procedure Under the Federal Rules*, §§12.9, 12.10, 12.15 (1966 ed.); Clark, *Handbook of the Law of Code Pleading*, 501-07 (1947). A plea in abatement attacked the indictment for reasons not apparent on the face of the indictment. Orfield at §12.8. It was ". . . an appropriate means of raising objections to an indictment which may involve serious and prejudicial infringements of procedural rights, such as an objection to the qualifications of grand jurors . . . to the method of selection of the grand jury . . . or its composition. . . ." See *United States* v. *Janitz*, 161 F. 2d 19, 21 (3d Cir. 1947); *United States* v. *Rintelen*, 235 F. 787, 788 (D.C., S.D. N.Y. 1916). Misnomer of the defendant in the indictment was also grounds for the plea. *United States* v. *Apex Distributing Co., supra*, at 753. The crucial characteristic of pleas in abatement was that they attacked the indictment by proof of extrinsic facts. At any rate, by 1942, demurrers and pleas in abatement encompassed motions attacking an indictment on its face or the institution of the prosecution leading up to the issuance of an indictment. *United States* v. *Janitz, supra.*

In 1946, the Federal Rules of Criminal Procedure abolished the use of common law procedures such as a demurrer and plea in abatement and substituted in their place the motion to dismiss the indictment under Rule

12, Fed. R. Crim. P. At the same time, the Advisory Committee on the Rules explained that the government's right to appeal should not be affected by the change in terminology. Notes of Advisory Committee on Rules, Note to Rule 54(c)(4), 18 U.S.C. p. 506. Rule 54(c) was enacted to provide that common law pleading terms, including demurrer and plea in abatement, which appear in Acts of Congress "shall be construed to mean the motion raising a defense or objection provided in Rule 12." Rule 54(c), Fed. R. Crim. P.

In 1948, Congress amended §3731 and for demurrers and pleas in abatement as a basis for government appeal to the court of appeals, substituted the words "decision or judgment setting aside, or dismissing an indictment or information." 18 U.S.C. §3731, ¶6. The change in wording was made to conform the terminology of the Act with the 1946 modernization in the Federal Rules of Criminal Procedure. No enlargement of the government's right to appeal was intended. *United States* v. *Sisson, supra,* at 292-93, n. 22; *United States* v. *Pack,* 247 F. 2d 168 (3d Cir. 1957). Thus, the government, under the 1948 legislation, could appeal under ¶6 from dismissals of indictments under Rule 12 which would have been cognizable in legal basis as orders responsive to demurrers or pleas in abatement at common law. And, as indicated earlier, these common law pleas were limited to objections to the wording in the indictment or to the proceedings culminating in the issuance of the indictment.

The Ninth Circuit reached this very same conclusion in *Apex,* when it held that the government could appeal from an order dismissing the case because of a defect in the indictment or institution of the prosecution. *United States* v. *Apex Distributing Co., supra,* at 755. The Third Circuit relied on the same principle in *United States* v. *Pack, supra,* as did the First Circuit in *United States* v. *Nardolillo,* 252 F. 2d 755 (1st Cir. 1958), and *United States* v. *Findley,* 439 F. 2d 970 (1st Cir. 1971). *Apex* was cited with approval in *Mann* v. *United States,* 304 F. 2d 394, 395, n. 1 (D.C. Cir. 1962). The Supreme Court has given implicit recognition to this interpretation of §3731. In *Sisson,* the Court, citing *Apex,* noted that no

substantive changes in the 1942 Act were intended in the 1948 amendments, *United States* v. *Sisson*, *supra*, at 292-93, n. 22. The Court stated, in analyzing appealability in *United States* v. *Fruehauf*, 365 U.S. 146, 157 (1961): "Nor does the record raise questions concerning the sufficiency of the indictment which would require, in an appropriate case, that the case be sent to the Court of Appeals, pursuant to 18 U.S.C. §3731." *Apex* was also cited in *Will* v. *United States*, 389 U.S. 90, 97, n. 5 (1967).[5]

We are thus convinced that the rule in *Apex* is a sound interpretation of ¶6 of §3731.

The government contends that this court should interpret ¶6 according to the plain meaning of the words in the provision. See Judge Pope's concurring opinion in *Apex* at 759-62. Resort to legislative history and intent, it is argued, is proper only when the wording of a statute is ambiguous on its face and when that analysis will remove the ambiguity.

This doctrine of statutory interpretation has been rejected by the Supreme Court, however, in a case involving construction of §3731:

> It is axiomatic, as a matter of history as well as doctrine, that the existence of appellate jurisdiction in a specific federal court over a given type of case is dependent upon authority expressly conferred by statute. And since the jurisdictional statutes prevailing at any given time are so much a product of the whole history of both growth and limitation of federal-court jurisdiction since the First Judiciary Act, 1 Stat. 73, they have always been interpreted in light of that history and of the axiom that clear statutory mandate must exist to found jurisdiction. *Carroll* v. *United States*, 354 U.S. 394, 399 (1957).

Appealability under §3731 is dependent upon an appellate court's characterization in common law pleading terms

[5] We reject the argument that the remand order in *United States* v. *Weller*, 401 U.S. 254 (1971), implies a conclusion contrary to that stated in *Apex*. See the panel's analysis in *United States* v. *Ponto*, *supra*, (slip op.) at 9, n. 6.

of the legal basis of the district court's ruling. The Supreme Court, in analyzing another part of §3731, which allows appeal from a decision "arresting a judgment of conviction," explained that:

> In using that phrase in the Criminal Appeals Act, Congress did not, of course, invent a new procedural classification. Instead Congress acted against a common-law background that gave the statutory phrase a well-defined and limited meaning. *United States* v. *Sisson, supra,* at 280.

The Court then reviewed the development of the statutory phrase under consideration from its common-law usage through its inclusion by Congress in §3731. This same approach was also utilized by the Supreme Court in two other recent §3731 cases, *United States* v. *Weller,* 401 U.S. 254 (1971), and *United States* v. *Jorn,* 400 U.S. 470 (1971). Such has been the analysis in most cases dealing with §3731. See, for example, Judge Learned Hand's discussion in *United States* v. *Zisblatt,* 172 F. 2d 740, 742 (2d Cir. 1949) ("The Criminal Appeals Act spoke to the law, as it then was.").[6]

Another interpretation of ¶6 urged upon us and mentioned by Judge Stevens in his dissent to the panel's opinion in *Ponto, supra,* (slip op.) at 11, is that we should examine the effect of a dismissal order rather than the reasons for its entry. This view finds support in one portion of the 1942 Committee Report, *supra,*

> The bill would . . . [p]ermit appeals to the circuit court of appeals from all decisions and judgments having the effect of quashing, setting aside, or sustaining demurrers or pleas in abatement to indictments or informations. . . .

It is claimed that Congress intended, by this statement, to allow the government to appeal from all pre-trial

[6] Congress has implicitly conceded that the interpretation of the 1948 Act according to common-law and legislative history was necessary. In discussing the changes in the 1970 enactment of §3731, Congress stated: "Technical distinctions in pleading as limitations on appeals by the United States were eliminated. . . ." 3 U.S. Code Cong. and Admin. News (1970), 91st Cong., 2d Sess., at 5848-49. This statement suggests that prior to the 1970 Act, Congress intended that §3731 be interpreted in light of technical distinctions in common law pleading.

dismissal orders in which the end result—the actual "effect" of the ruling—is the dismissal of the indictment. Such an interpretation would include virtually all dismissals prior to trial since most pre-trial orders dismissing the action do so by dismissing the indictment under Rule 12 of the Federal Rules of Criminal Procedure. *United States* v. *Heath*, 260 F. 2d 623, 628 (9th Cir. 1958); *United States* v. *Apex Distributing Co., supra*, at 751 ("The dismissal of a criminal action inescapably sets aside or dismisses the indictment or information on which it is based.").

We do not believe such a broad reading was intended by Congress. The 1942 Report, as quoted *supra*, states that the enactment would limit the right of appeal to dismissal orders "involving the sufficiency of the allegations in the indictment or information" when raised by demurrer or plea in abatement. The extraction of the phrase, "having an effect," from the 1942 Committee Report does not necessitate a contrary conclusion.[7] Further, such a broad reading of the words in §3731 would violate the long standing principle that the Act should be strictly construed against the government's right to appeal. *United States* v. *Sisson, supra*, at 270, 286, 291; *Carroll* v. *United States, supra*, at 394, 400, 406; *United States* v. *Borden Co.*, 308 U.S. 188, 192 (1939). In addition, we rely on the Supreme Court's statement with respect to §3731: "While it is always necessary to categorize a situation realistically, to place a given order according to its real effect, it remains true that the categories themselves were defined by the Congress in terms of form." *Carroll* v. *United States, supra*, at 406. Thus, ". . . in a limited sense, form *is* substance with respect to ascertaining the existence of appellate jurisdiction." *Id.* As in *Apex*, we must examine the legal basis

[7] We note that the legislative history of the 1970 version of §3731 states:

> Technical distinctions in pleading as limitations on appeals were eliminated and in their place the Government was authorized to appeal any decision or order terminating a prosecution except an acquittal.
>
> 3 U.S. Code Cong. & Admin. News (1970), *supra* at 5848.

This explanation by Congress in 1970 implies that in 1942 and 1948 it did not authorize an appeal from any pre-trial order terminating a prosecution (except an acquittal) which has the effect of dismissing the indictment.

of the dismissal order rather than its end result to determine whether it is included within the restricted definitions in §3731.

Applying the standard of appealability we have enunciated to the facts in this case, we find that the dismissal order was not based on a defect in the wording of the indictment or in the institution of the prosecution. There was no contention below that the indictment was fatally insufficient or that the proceedings culminating in the issuance of the indictment were faulty in any way. Rather, the judge seemed to be disturbed about the draft board's procedures in classifying Ponto I-A. His comments prior to his ruling on the motion to dismiss focused on these considerations. The alternatively titled motion to dismiss the action dealt with Ponto's classification and the actions of the draft board, and was not an attack against the indictment itself.

II.

An objection to the local board's classification of a registrant can be raised as a defense to a prosecution under 50 U.S.C. App. §462. The Selective Service Act, 50 U.S.C. App. §460(b)(3), provides that all questions relating to judicial review of the classification and processing by a board be reviewed in this manner. The motion in the instant case presented questions concerning Ponto's classification, which are raised only by defense. The decision to dismiss by the district judge was based on questions presented by this defense. As such, it was a ruling on the merits of the defense.

The panel in *Ponto* decided that the order was in the nature of an acquittal, *i.e.*, a ruling on the merits by which the defendant was discharged from prosecution. See *Pratt* v. *United States*, 102 F. 2d 275, 279 (D.C. Cir. 1939). Upon reconsideration, we conclude that the ruling below was, in fact, an acquittal, and for this reason, appeal by the government is prohibited by the double jeopardy clause of the Fifth Amendment.

The defense raised by the motion below could have been decided at trial. See *United States* v. *Ramos*, 413 F. 2d 743, 744, n. 1 (1st Cir. 1969). Yet, a defense on the

merits can likewise be decided prior to trial,[8] as it was here. Rule 12(b)(1) of the Federal Rules of Criminal Procedure allows a party to present prior to trial a motion to dismiss on a defense "which is capable of determination without trial of the general issue. . . ." See *United States* v. *Covington*, 395 U.S. 57, 60 (1969); *United States* v. *Fargas*, 267 F. Supp. 452, 455 (S.D. N.Y. 1967). We believe that the motion ruled upon by the court below fits into this category. The validity of a classification involves questions of law for the judge, as in any judicial review of administrative decision-making. *United States* v. *Ramos*, *supra*, at 744-45, n. 1; *Martinetto* v. *United States*, 391 F. 2d 346, 347 (9th Cir. 1968). The jury is to determine whether, in fact, the defendant refused to submit to induction. Questions involving the validity of the defendant's classification do not come before it. For this reason, in many cases, a ruling on the merits of a defense of improper classification could be made by the judge prior to trial when ". . . trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of the defense." *United States* v. *Covington*, *supra*, at 60. We find that the pre-trial motion presented to the judge in this case was of such a character.

Since the dismissal order was based on a determination on the merits, it was an acquittal to which jeopardy attached.[9] *United States* v. *Sisson*, *supra*, at 289-290; *United States* v. *Ball*, 163 U.S. 662 (1896); *Green* v. *United States*, 355 U.S. 184 (1957); *Helvering* v. *Mitchell*, 303 U.S. 391, 398 (1938). See *United States* v. *Jorn*, 400 U.S. 470, 479 (1971). Thus, government appeal from this ruling would violate the double jeopardy clause of the Fifth Amendment since a retrial on the charge would be prohibited. *Kepner* v. *United States*, 195 U.S. 100 (1904); *United States* v. *Ball*, *supra*. We view this as an independent ground for holding that the government may not appeal in this case.[9]

[8] That the judge did not review the contents of Ponto's selective service file does not change the character of his ruling. His failure to review the file may be erroneous, but it does not create appellate jurisdiction. See *United States* v. *Sisson*, *supra*, at 295.

[9] Double jeopardy considerations enter into the legislative history of §3731. *United States* v. *Sisson*, *supra*, at 298-99, 305. The Act limited

For the reasons we have stated, we dismiss this appeal for lack of jurisdiction.[10]

B.

UNITED STATES OF AMERICA v. RAYMOND J. GROCHOWSKI

The defendant, Raymond J. Grochowski, was indicted for refusing to submit to induction into the Armed Forces, 50 U.S.C. App. §462. Prior to trial, the district court dismissed the indictment because the defendant, claiming to be a conscientious objector, had not presented his conscientious objector (I-O) claim to his local draft board. In dismissing the action, the judge remanded the case to

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[9] (Continued)

government appeal in those situations where retrial was permissible under the double jeopardy clause. As the Court in *Sisson* stated at 299: "A primary concern of the bill that emerged into law was that no appeal be taken by the Government from an acquittal no matter how erroneous the legal theory underlying the decision." Congress was mindful of the fact that "[c]riminal appeals by the Government 'always threaten to offend the policies behind the double-jeopardy prohibition,' *Will* v. *United States*, *supra*, at 96, even in circumstances where the Constitution itself does not bar retrial." *United States* v. *Sisson*, *supra*, at 298. The Criminal Appeals Act merely limits government appeal in cases where jeopardy has not attached. "No Senator thought that Congress had the power under the Constitution to provide for an appeal in circumstances in which that would violate the Constitution." *Id.* at 305. To view the Act as broader would render it unconstitutional.

[10] The government urged at oral argument that we treat this case as a petition for a writ of mandamus. We follow the holding of the Supreme Court in *Fong Foo* v. *United States*, 369 U.S. 141 (1962), that a court of appeals possesses no jurisdiction to issue a writ of mandamus after an acquittal. The issuance of the writ would violate the double jeopardy clause.

Assuming the double jeopardy clause did not bar appeal in this case, the only possible basis for the issuance of mandamus would be that the actions of the district judge amounted to a clear abuse of power. And even then, we would be faced with the question of whether mandamus jurisdiction exists when appellate jurisdiction is lacking under §3731. The Second Circuit in *United States* v. *Dooling*, 406 F. 2d 192 (2d Cir. 1969), cert. denied, 395 U.S. 911 (1969), reh'g denied, 400 U.S. 874 (1970), held that a petition for mandamus may be granted even if the government is barred from appeal under §3731. The Supreme Court indicated in *Will* v. *United States*, 389 U.S. 90, at 97 (1967), that mandamus ". . . may never be employed as a substitute for appeal in derogation" of the policies of §3731. These cases suggest that a writ of mandamus may be granted in a case ostensibly unappealable under §3731, when the district judge so abuses his authority as to render his decision a nullity.

In any event, we believe that the district judge clearly possessed the power to rule on the defense prior to trial under Rule 12, Fed. R. Crim. P., even if his ruling may have been erroneous. In *Dooling*, the action of the district judge clearly amounted to a judicial usurpation of power.

the board to give the defendant an opportunity to present his I-O claim. The government appealed this dismissal order.

A three-judge panel of this court ruled that the government was barred under 18 U.S.C. §3731 from appealing the dismissal order to this court or the United States Supreme Court.[11] *United States* v. *Grochowski* (No. 18874, slip op. Jul. 27, 1971), ..., F. 2d ..... (7th Cir. 1971). Subsequently, the government's petition for rehearing *en banc* was granted. Upon consideration by the entire court, we affirm the panel's opinion that the government is barred from appeal, and dismiss for lack of jurisdiction.

I.

The dismissal order was not based on any defect in the indictment or institution of the prosecution. The judge's order addressed itself to the classification of the defendant and was intended to allow the defendant to raise his I-O claim before his local board. These matters are raised by defense and not by objections to the sufficiency of the indictment or institution of the prosecution. Consequently, the government may not appeal under §3731.

II.

We also believe that the order below was an acquittal and thus appeal is prohibited by the double jeopardy clause of the Fifth Amendment. The ruling that the defendant did not present a written request for an I-O reclassification addressed itself, however erroneously, to the classification process. As such, it was a decision on the merits of a defense which could have been raised at trial, but which was capable of determination prior to trial under Rule 12(b)(1) of the Federal Rules of Criminal Procedure. Jeopardy attached to the ruling, and the government is thus prohibited from an appeal.

The decision of the three-judge panel is affirmed. This appeal is dismissed for lack of jurisdiction.

APPEALS DISMISSED.

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[11] The panel decided that the "motion in bar" provision of §3731 was inapplicable. Since the government's petition for rehearing did not contest this ground and since it was not argued at the rehearing *en banc*, we do not deem it necessary to reconsider it here.

KILEY and FAIRCHILD, *Circuit Judges*, concurring. We concur in Judge Kerner's opinion. With respect to Part II [in both *Ponto* and *Grochowski*] it is our analysis that the order of the district court appealed from was a dismissal with prejudice and had the effect of barring a second prosecution. *White* v. *United States*, 377 F.2d 948 (D.C. Cir. 1967); *see United States* v. *Oppenheimer*, 242 U.S. 85, 87 (1916).

No. 18396

STEVENS, *Circuit Judge*, dissenting, with whom CUMMINGS and SPRECHER, *Circuit Judges*, join. The indictments of Grochowski and Ponto were dismissed in advance of trial. In each case the trial judge was apparently persuaded that there was a defect in the defendant's classification by the Selective Service Board. In Grochowski's case, as a result of the Supreme Court's later decision in *Ehlert* v. *United States*, 402 U.S. 99, it is plain that the district court erred. In Ponto's case, it is equally plain that the indictment was valid on its face.[1]

These cases happen to involve alleged violations of the Selective Service law. The problem they identify, however, cuts across the whole spectrum of criminal justice, from cases like the ill-fated Sherman Act prosecution of the "Beef Trust,"[2] which led to the original enactment of the Criminal Appeals Act in 1907,[3] to more familiar forms of federal crime. At issue is the scope of a district judge's absolute power to decide, for whatever reason may appeal to his fancy, that a defendant may not be required to stand trial. More narrowly, the question is

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[1] Ponto's motion was based, in part, on the fact that his file contained a letter written by a former Assistant U.S. Attorney recommending against prosecution. There was also a claim that a "courtesy hearing" in response to the last of Ponto's various claims for exemption amounted to a *de facto* reopening. The Government urges that the district court's action was so clearly without a proper legal basis that the dismissal was void.

[2] *United States* v. *Armour & Co.*, 142 Fed. 808 (N.D.Ill. 1906).

[3] See, *e.g.*, debates on the 1907 legislation, 41 Cong. Rec. 2753 (Feb. 12, 1907, remarks of Sen. Patterson); *id.* at 2757 (Feb. 12, 1907, remarks of Sen. Nelson); id. at 3046 (Feb. 15, 1907, remarks of Rep. Jenkins and Rep. Crumpacker).

whether 18 U.S.C. § 3731 authorizes a court of appeals to review a district court order dismissing an indictment in advance of trial if the trial judge has erroneously concluded, on the basis of matter not disclosed in the indictment itself, that the defendant is not guilty.

There are two quite different theories which might support a holding that we have no jurisdiction of these appeals. The majority has adopted both. On the one hand, the court's opinion holds that Ponto and Grochowski were really acquitted even though the district judges merely purported to dismiss their respective indictments. On the other hand, the opinion also holds that even though the orders were dismissals rather than acquittals, they are not appealable because the statute does not mean what it says.

Under the first theory the objection to our appellate jurisdiction is constitutional and there is no need to analyze the statutory language or the niceties of the common law which interested the Ninth Circuit in *Apex*.[4] If the double jeopardy clause applies, defendants may not be reindicted, and the Government may not appeal. *United States* v. *Ball*, 163 U.S. 662, 671; *United States* v. *Sisson*, 399 U.S. 267, 289-290. Under this approach, the cases take on exceptional importance because the holding will also determine appealability of comparable orders under the Omnibus Crime Control Act of 1970,[5] which amended 18 U.S.C. § 3731.

Under the second theory, the objection to our appellate jurisdiction rests on an esoteric exception to plainly written statutory language. The existence and scope of the

[4] *United States* v. *Apex Distributing Co.*, 270 F.2d 747 (9th Cir. 1959).

[5] Section 14(a) of that statute, which amends § 3731, provides, in part:

"In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution." 84 Stat. 1880.

The new statute is applicable to prosecutions commenced subsequent to January 2, 1971.

See footnote 4 to Mr. Justice White's dissenting opinion in *United States* v. *Sisson*, 399 U.S. at 328-329; see also the statement of Mr. Justice Black and Mr. Justice Brennan in *United States* v. *Jorn*, 400 U.S. 470, at 487-488.

exception are thought to be based on common law distinctions which the statute was amended to eliminate. To discover the exception, the Ninth Circuit made a microscopic analysis of language which had been eliminated from the statute in 1948 without noticing that language which was retained by Congress provided a sufficient basis for appellate review of a pretrial order "setting aside" an indictment. As Mr. Justice Holmes recognized in 1913,[6] a simple reading of those words will avoid the niceties of an argument predicated on other language in the Act. The exception discovered by the Ninth Circuit is so esoteric that it was unknown to any of the litigants in these cases when their original briefs were filed,[7] to any member of the Supreme Court when *Weller* was remanded to the Ninth Circuit,[8] or to any member of Congress when § 3731 was amended in 1948.

The majority opinion rests on both the constitutional and statutory theories. It is, therefore, appropriate to explain why neither is tenable.

I.

Whether the problem is analyzed in constitutional terms, as a matter of interpreting applicable procedural rules, or solely by considering what the district judges did in these cases, it is perfectly clear that the challenged orders were not acquittals.

The Fifth Amendment provides that no person shall be subject for the same offense "to be twice put in jeopardy." Quite obviously the prohibition is inapplicable until a defendant has been put in jeopardy at least once.[9]

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[6] See *United States* v. *Adams Express Co.*, 229 U.S. 381, 388, quoted at footnote 33, *infra*.

[7] Neither Ponto nor Grochowski *originally* questioned our jurisdiction on either of the theories discussed in this opinion. Both contended the district court action should be considered a plea in bar and therefore appealable only to the Supreme Court under the fourth paragraph of § 3731. Both also argued, alternatively, that the district court action was a judgment of acquittal which precluded any appeal. Neither cited *Apex*; neither contended that there was a category of non-appealable dismissals; neither contended that jeopardy would have attached absent a conclusion that the action of the district court was a judgment of acquittal.

[8] See *United States* v. *Weller*, 401 U.S. 254.

[9] See *Shevlin-Carpenter Co.* v. *Minnesota*, 218 U.S. 57, 67; *State* v. *War*, 38 N.J. Super. 201, 118 A.2d 553, 555 (1955).

It has long been settled that the mere return of an indictment, the entry of a not guilty plea, or the conduct of a preliminary examination does not place a defendant in jeopardy. *Bassing* v. *Cady*, 208 U.S. 386, 391-392; *Collins* v. *Loisel*, 262 U.S. 426, 429-430. "Jeopardy attaches" when the trial commences. *United States* v. *Jorn*, 400 U.S. 470, 480.[10]

In these cases the trials never started. There had been no waiver of a jury by either Ponto[11] or Grochowski, and no jury had been impanelled. In both cases the defendants' motions were supported by their Selective Service files, and during the hearing on Grochowski's motion, he took the stand to explain why he had not claimed conscientious objector status before his draft board. However, neither the judge nor the parties treated the preliminary proceedings as a part of the trial itself. At most it could be said that each defendant supported his motion to dismiss with factual matter which the judge regarded as a valid defense to the charge. In my opinion, since the defendants had not been placed in jeopardy, they are not entitled to the constitutional protection which flows from a judgment of acquittal.

The Federal Rules of Criminal Procedure do not contemplate the entry of a judgment of acquittal until "after the evidence on either side is closed." Rule 29, Fed. R. Crim. P. The fact that an order may be given the wrong name does not prevent it from operating as an acquittal provided that it is predicated "upon evidence adduced at the trial." *United States* v. *Sisson*, 399 U.S. 267, 290.[12]

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[10] In a jury trial the critical point is when the jury is impanelled; in a bench trial, when evidence is first received. See, *e.g.*, *Hunter* v. *Wade*, 169 F.2d 973 (10th Cir. 1948), *aff'd* 336 U.S. 684, *reh. denied*, 337 U.S. 921; *Newman* v. *United States*, 410 F.2d 259 (D.C. Cir. 1969).

[11] Ponto's attorney indicated at the hearing on the motion that he was "willing" to submit the issue to a bench trial, but he never did so. No jury waiver was ever filed.

[12] The entire paragraph from which the phrase is quoted precludes an interpretation of *Sisson* as permitting an acquittal in advance of trial:

"There are three differences between the hypothetical case just suggested and the case at hand. First, in this case it was the judge —not the jury—who made the factual determinations. This difference alone does not support a legal distinction, however, for judges, like juries, can acquit defendants, see Fed. Rule Crim. Proc. 29. Second, the judge in this case made his decision *after* the jury had brought in a verdict of guilty. Rules 29(b) and (c) of the Federal Rules

In the federal system there is no rule of criminal procedure authorizing the entry of a pretrial judgment of acquittal.[13] Finally, it should be noted that although the prayer of Ponto's motion was "for a dismissal of the indictment or, in the alternative, for a directed judgment of acquittal," the trial judge stated unequivocally that he was granting the motion to dismiss.[14] Grochowski moved to dismiss and remand to the local board. The trial judge ordered "that the indictment be dismissed and the case remanded to the defendant's local draft board for consideration of his conscientious objector claims."

In my opinion neither of the challenged orders was an acquittal; each was a decision or judgment setting aside or dismissing an indictment.

II.

The applicable statute, 18 U.S.C. § 3731, authorizes appeals on behalf of the United States in "all criminal cases" from "a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof." If an order is covered by this language it is appealable either to the Supreme Court[15] or to a court

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[12] (Continued)

of Criminal Procedure expressly allow, however, a federal judge to acquit a criminal defendant after the jury 'returns a verdict of guilty.' And third, in this case the District Judge labeled his post-verdict opinion an arrest of judgment, not an acquittal. This characterization alone, however, neither confers jurisdiction on this Court, see n. 6, *supra*, nor makes the opinion any less dependent upon evidence adduced at the trial. In short, we see no distinction between what the court below did, and a post-verdict directed acquittal." (Emphasis in original.)

[13] There are, of course, orders of dismissal which determine the merits and, therefore, bar a second indictment on *res judicata* grounds. See, *e.g.*, *White* v. *United States*, 377 F. 2d 948 (D.C. Cir. 1967). The fact that such an order acts as a bar does not affect its appealability. See, *e.g.*, *United States* v. *Covington*, 395 U.S. 57.

[14] "Mr. Werksman: Will your Honor grant my motion to dismiss?
"The Court: Yes. Attach a copy of the file to your minute order and motion." (A. 75)

[15] Paragraphs one and two of § 3731 read as follows:

"An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded."

of appeals.[16] The appeal goes to the Supreme Court if the decision is based upon the validity or construction of the statute upon which the indictment is founded: otherwise it goes to a court of appeals.

The statute also authorizes an appeal from an order sustaining a motion in bar or a motion arresting a judgment of conviction. Thus, except for acquittals, the statute purports to provide for an appeal by the Government from every kind of adverse final order described in the Federal Rules of Criminal Procedure. The orders before us definitely did not arrest judgments of conviction, and I think it is equally clear that they are not acquittals. Although the point is not free of difficulty, I also am persuaded that they did not sustain motions in bar.[17] Accordingly, I am left with the question whether the orders come within the category of decisions or judgments "setting aside or dismissing any indictment."

There can hardly be any doubt that the plain language of the statute describes these orders. I believe all of the opinions in *Apex*, and also the majority here, would accept that proposition.[18] For reasons eloquently stated by Judge Pope in his separate opinion in *Apex*,[19] that really should be the end of the matter. Nevertheless, to avoid the risk that there is a hidden category of exceptions which the legislature inadvertently failed to identify, it may be appropriate to review the statute's history.

Clear legislative history may modify a somewhat ambiguous statute; I doubt if ambiguous history should ever

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[16] Paragraphs five and six of § 3731 provide:

"An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section."

[17] *Cf. United States* v. *Covington*, 395 U.S. 57; see *United States* v. *Mersky*, 361 U.S. 431, 441-443, Mr. Justice Brennan concurring. *United States* v. *Weller*, 401 U.S. 254, 259-261, persuades me that Judge Kerner's analysis of this aspect of the case, as set forth in his opinion for the original panel in *Ponto*, is proper. Whether that analysis can survive the *en banc* holding, relying in part on *Covington*, that Ponto's dismissal was really an acquittal, is not entirely clear.

[18] See 270 F.2d 747, 751, 754, 759-762.

[19] 270 F.2d at 759-762.

prevail over a clear statute. But when legislative history merely confirms the unambiguous meaning of the statutory language itself, certainly judicial concern with a policy disfavoring appeals by the Government should give way to the mandate of Congress.

There are three chapters in the history of the Criminal Appeals Act. Appeals by the Government in criminal cases were first authorized in 1907, but only to the Supreme Court and only from certain decisions.[20] In 1942 the scope of the Government's right to appeal was broadened and review by a court of appeals was first authorized.[21] In 1948, in order to conform the statutory language of that used in the Rules of Criminal Procedure which had been adopted two years earlier, Congress replaced terms such as "demurrer," "motion to quash," and "plea in abatement" with phrases like "motion to dismiss." The relevant parts of the three chapters can be briefly identified.

With respect to the 1948 enactment, two points are perfectly clear. First, following the lead taken by the judiciary when the Rules of Criminal Procedure were adopted in 1946, Congress sought to eliminate the use of

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[20] 34 Stat. 1246. As enacted on March 2, 1907, the statute read as follows:

"That a writ of error may be taken by and on behalf of the United States from the district or circuit courts direct to the Supreme Court of the United States in all criminal cases, in the following instances, to wit:

"From a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded.

"From a decision arresting a judgment of conviction for insufficiency of the indictment, where such decision is based upon the invalidity or construction of the statute upon which the indictment is founded.

"From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy.

"The writ of error in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted and shall have precedence over all other cases.

"Pending the prosecution and determination of the writ of error in the foregoing instances, the defendant shall be admitted to bail on his own recognizance: *Provided*, That no writ of error shall be taken by or allowed the United States in any case where there has been a verdict in favor of the defendant."

[21] 56 Stat. 271.

ancient common law terms.[22] Second, the draftsmen of the legislation obviously thought that the 1942 Act already authorized appeals by the Government in all cases described by the new statutory language.[23]

In my opinion they correctly interpreted the 1942 Act, but even if we assume that they were unaware of certain obscure exceptions to the 1942 law, such ignorance would be irrelevant to an appraisal of their actual intent in 1948. Language which is as plain as "a decision or judgment setting aside or dismissing any indictment or information, or any conduct thereof" can hardly have been misunderstood by Congress, regardless of whether its understanding of the 1942 Act was perfect or imperfect.

The history of the 1942 Act is sparse, but again certain propositions are perfectly clear. The new Act substantially broadened the Government's right to appeal. Prior to 1942 orders dismissing indictments had been appealable only to the Supreme Court and, except those which sustained special pleas in bar,[24] were not appealable at all unless based on a question of statutory construction or constitutionality.[25] In the 1942 Act, this requirement was preserved as a condition to direct appeal to the Supreme Court, but was completely eliminated as a condition to appellate review. This change obviously multiplied the instances in which the Government might appeal.

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[22] "The administration of justice under our Federal criminal laws was greatly facilitated by the promulgation of the new Federal Rules of Criminal Procedure. However, the process of modernizing our antiquated Federal criminal laws is only half done. The task, so carefully planned and skillfully executed, of providing the Nation with a vastly improved structure of criminal laws, will be complete when this bill becomes law." H.Rep. 304 (80th Cong., 1st Sess.) pp. 8-9.

[23] For that reason the changes conforming the statutory language to the new Rules of Criminal Procedure were appropriately characterized as "minor." The reviser's note stated, in part:

> "The word 'dismissing' was substituted for 'sustaining a motion to dismiss' in two places for conciseness and clarity, there being no difference in effect of a decision of dismissal whether made on motion or by the court sua sponte.
>
> "Minor changes were made to conform to rule 12 of the Federal Rules of Criminal Procedure."

[24] The classic examples of such pleas, *autrefois acquit* and *autrefois convict*, were, of course, akin to the constitutional claim of double jeopardy.

[25] See footnote 20, *supra*.

Moreover, the description of the kinds of orders which were to be appealable was enlarged to include specific reference to informations as well as indictments, and to pleas in abatement as well as demurrers, motions to quash, and orders "setting aside" indictments.[26] Since special pleas in bar were covered in a separate paragraph, the full list of appealable orders described in the 1942 Act could reasonably be interpreted as covering every kind of pretrial dismissal of an indictment then known to the law.

This interpretation is confirmed by the statement in the House Committee Report that the statute would enlarge the power of the United States to appeal from all decisions and judgments "*having the effect of* quashing, setting aside, or sustaining demurrers or pleas in abatement to indictments or informations and from all decisions arresting judgments of conviction."[27] (Emphasis supplied.)

It is true that the Committee Report identified the policy considerations disfavoring appeals by the Government. It is more significant to recognize, however, that not only the Committee, but also a unanimous Congress,[28] decided that these considerations were outweighed by the desirability of broadening the Government's right to appeal. The benefits to the public at large of uniform and evenhanded interpretation of criminal statutes were clearly recognized when the statute was originally debated in 1907,[29] and though not expressly reiterated in 1942,

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[26] The relevant paragraph of the 1942 Act provided for an appeal on behalf of the United States to a circuit court of appeals [f]rom a decision or judgment quashing, setting aside, or sustaining a demurrer or plea in abatement to any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this Act." 56 Stat. 271.

[27] H. Rep. No. 45 (77th Cong. 2d Sess.) p. 2, 1942 U.S. Code Cong. Serv. 487, 488.

[28] H.R. 139 passed the House and Senate unanimously. There were some differences over the procedure on appeal resolved in conference. The unanimous conference report was then agreed to by both Houses. See 88 Cong. Rec. 3949 (May 5, 1942).

[29] "The reason, Mr. President, that I, as a member of the Committee on the Judiciary, favor this bill is this: Without this bill in the criminal law there is liable to be the greatest confusion throughout the country. Congress passes a law, and we find that the district court — it may be of Ohio — will render a decision that the law is unconstitutional. The district court in the state of Kentucky may render a decision that it is constitutional. The decision of one district court is in no manner binding

must have motivated the important action which Congress then took.

It is also true that in explaining the desirability of enactment, the Committee pointed out that cases involving the sufficiency of the allegations in an indictment should

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[29] (Continued)

or conclusive upon another district court. Decisions of such courts are only persuasive, and not controlling. They may be controlling within the jurisdiction in which they are rendered, but they are not controlling outside of that jurisdiction. And we would have, Mr. President, this strange and extraordinary condition as we have had it — and to my mind it is a disgrace to the judiciary of the country that such things should be witnessed. We have a district court in one jurisdiction holding that a law is ineffective for one reason or another — it may be that it is unconstitutional, or for some other reason — and we have a district court in another jurisdiction holding the reverse; and as the cases multiply in the several sections of the country we may find one half of the courts of the country arrayed against the other half of the courts of the country upon the same identical law; one half holding that it is entirely constitutional and the other half holding that it is unconstitutional. So, Mr. President, that confusion, that ridiculous condition exists and must continue to exist because as the law now stands, until a case involving the question shall go to the Supreme Court and it is brought there by the defendant, there can be no adjudication by a court whose decision and judgment is controlling.

"I am quite willing to have it said, so far as I am concerned, that the decision of Judge Humphreys in the Chicago case led to the legislation that is now proposed. Why should it not, Mr. President? If it calls the attention of the country to a condition of our laws that is absurd, that leads to injustice in one half of the country and to justice in the other half, to a condition of our laws that will permit the same law to be held constitutional in one half of the country and unconstitutional in the other half, and have a citizen committing an act that is not an offense in one half of the country but is an offense in the other half of the country, the same act being done without any fear of consequence in certain States in the union and leading to the penitentiary, it may be, in other States in the Union — if that condition has been brought to the attention of the country and of Congress, Congress has done right to grapple with the question and to make it possible to eliminate such a status from the laws and their enforcement in the United States." 41 Cong. Rec. 2753, (Feb. 12, 1907, remarks of Sen. Patterson).

"Mr. President, I can not see the argument presented by the Senator from Nevada [Mr. Newlands]. . . . . I can see how the Senator from Nevada would bring about a very unequal administration of the criminal laws if in one case he provides that a man shall be permitted to go absolutely free on the erroneous decision of one judge as to the constitutionality of a law while a man tried for exactly the same offense before another judge under the same law would be put in the penitentiary. It looks to me that the latter individual might have some right to complain, at least of the inequality of the administration of the law." 41 Cong. Rec. 2822 (Feb. 13, 1907, remarks of Sen. Carmack).

See also Congressional Record references in notes 48 and 49, *infra*.

be reviewable.[30] No court, however, — not even the Ninth Circuit — has interpreted the 1942 Act as limited to such cases.[31] Such a narrow reading could not possibly be reconciled with the fact that the appealability of orders sustaining pleas in abatement was first authorized in 1942, because the common law plea in abatement did not test the sufficiency of the indictment. See *United States* v. *Brodson*, 234 F.2d 97, 99 (7th Cir. 1956). See also, *e.g.*, 3 Foster, Federal Practice § 517 (6th ed. 1921).

In short, the history of the 1942 Act does not support a reading of the statute which is any narrower than its actual language. On the contrary, if appropriate significance is attached to the legislative decision to broaden the Government's right to appeal notwithstanding the countervailing policy considerations, it is fair to infer that the expressed desire to authorize appeals from all decisions and judgments "having the effect of" granting

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[30] "Nevertheless your committee feels that the Government should have the right to appeal to the circuit court of appeals from the district court from decisions on demurrers or pleas in abatement to indictments or informations in cases involving the sufficiency of the allegations in the indictments or informations in the same manner in which the Government may now appeal from decisions on demurrers to indictments direct to the Supreme Court in those cases involving the invalidity of a statute or the construction of a statute." H. Rep. No. 45 (77th Cong. 2d Sess.) p. 2, 1942 U.S. Code Cong. Serv. 488. See 270 F.2d at 752. The sentence quoted above is the only excerpt from the entire legislative history which even arguably supports the proposition that the committee stated that the 1942 enactment would *limit* the right of appeal to dismissal orders involving the sufficiency of the allegations in the indictment or information. There is a rather obvious difference between identifying a category of dismissals to which the statute will apply and stating that the statute was intended to be limited to that particular category. Indeed, if such a limitation had been intended, the *Apex* court's interpretation of the statute as covering all dismissals based on a defect in the indictment or information, *or in the institution of the prosecution*, was actually a broadening rather than a narrowing construction of the act.

[31] The reasoning of the *Apex* opinion implies that such a narrow construction would be appropriate, but the opinion itself refuses to go that far since it recognizes that pleas in abatement, even as it has defined them, are not merely directed to the sufficiency of the allegations. 270 F.2d at 753-754. The *Apex* court's translation, which went beyond sufficiency, was that the Government could appeal from an order dismissing the case because of a defect in the indictment or institution of the prosecution. The latter phrase covers some, but not necessarily all, pleas in abatement. I do not think it is fruitful, however, to judge the Government's right to appeal on the basis of this shorthand translation of the statute rather than the broader words of the statute itself, as enacted in 1942 or in 1948.

pretrial relief to a defendant in any of the enumerated categories was intended to be as broad as the plain language which was substituted in 1948.

Reference to the 1907 Act is appropriate to demonstrate that the statute has never contained an esoteric admonition to adhere to common law technicalities rather than the language of the statute itself. Since its original enactment, the relevant portion of the Criminal Appeals Act has consistently covered orders "setting aside" indictments. If there ever was a common law motion or plea to "set aside" an indictment, I have been unable to find any literature describing it.[32] It is, therefore, reasonable to infer that inclusion of orders "setting aside" indictments in the 1907 Act was specifically intended to minimize the necessity for analyzing the niceties of the common law in determining the scope of appellate jurisdiction authorized by the statute.[33]

I recognize, of course, that certain provisions of the statute derive meaning from their common law antecedents. For reasons not applicable in these cases, the Supreme Court has looked to the common law for explanation of the special plea in bar and arrest of judgment paragraphs which provide that Court with direct appellate jurisdiction. Each of these provisions, unlike the broad language in the second and sixth paragraphs of the

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[32] The *Apex* opinion contains no satisfactory explanation of the words "setting aside"; apparently the Ninth Circuit considered them redundant. See 270 F.2d at 753. The words were, of course, included in the 1907 Act as well as the 1942 and 1948 revisions. Mr. Justice Holmes did not consider them redundant (see note 33 *infra*) and it is significant that they were retained in the statute when the various common law terms that *Apex* analyzed so carefully were eliminated. In short, the *Apex* opinion attaches greater significance to the words of the 1942 statute that were eliminated than to the words that were retained in 1948.

[33] In his opinion for the Court in *United States* v. *Adams Express Co.*, 229 U.S. 381, Mr. Justice Holmes simply relied on the statutory words "setting aside" to avoid the niceties of defendant's argument:

> "It is objected that this court has no jurisdiction of the present writ of error under the act of March 2, 1907, c.2564, 34 Stat. 1246, and that the court below had no authority to treat the motion of Barrett as equivalent to a demurrer. Without following the defendant into the niceties by which it seeks to escape the jurisdiction of this court after having eluded that of the court below, it is enough to say that in our opinion, if we are to go behind the entry, the decision entered was one setting aside the indictment and was based upon the construction of the statute upon which the indictment is founded, within the meaning of the act of March 2, 1907." 229 U.S. at 388.

present Act, or the apparently all-inclusive list in the corresponding portions of the 1942 Act, obviously refers to a specific common law antecedent. Moreover, it is appropriate to contrast a broad right of appeal to any one of eleven circuits with a narrowly restricted right of direct appeal to the Supreme Court. The Supreme Court's analysis of its own mandatory jurisdiction in the motion in bar cases is not necessarily relevant to a proper construction of terms such as "setting aside" in the statutory definition of our jurisdiction. For that reason, as well as the importance of honoring the constitutional benefits which flow from an acquittal of a defendant who has been placed in jeopardy, I do not believe that the common law analysis of arrests of judgment in Mr. Justice Harlan's opinion in *Sisson* bears on the problem presented by these appeals.

I recognize, as does the majority, that Mr. Justice Harlan cited *Apex* in a footnote to his opinion in *Sisson*.[34] But he also cited Judge Duffy's opinion for this court in *Brodson*,[35] which plainly holds that the Government has a broader right to appeal than *Apex* recognizes.[36] If the citation of *Apex* in the *Sisson* opinion can be interpreted as an awareness of the question involved here, the Supreme Court's disposition of *Weller* shortly thereafter takes on added significance.[37]

In *Weller*, as here, the district court dismissed an indictment on the basis of facts not disclosed in the indictment itself. Like Ponto and Grochowski, Weller was indicted for refusing to submit to induction. In the Selective Service proceeding he had requested that his lawyer be allowed to accompany him in an appearance before his local board. Relying on a 1940 regulation,[38] the board denied his request. These facts were brought to the atten-

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[34] He cites *Apex* for the proposition that the 1948 Act was not intended to broaden the coverage of the 1942 Act. See 399 U.S. at 293 n.22. There was no occasion to consider the scope of the 1942 Act.

[35] 234 F.2d 97 (7th Cir. 1956). *Brodson* is cited in connection with the issue as to which court has appellate jurisdiction, not as to whether there is any appeal from a dismissal. See 299 U.S. at 308.

[36] The *Apex* opinion expressly recognizes this fact. See 270 F.2d at p. 758.

[37] *United States* v. *Weller*, 401 U.S. 254, decided on Feb. 24, 1971. *Sisson* was decided on June 29, 1970.

[38] See *Wright* v. *Ingold*, 445 F.2d 109, 112, n.6.

tion of the district court in support of Weller's motion to dismiss the indictment. The motion to dismiss was granted on the ground that the regulation was invalid.[39]

The Government filed a notice of appeal to the Supreme Court, but before argument the Solicitor General asked that Court to remand the case to the Ninth Circuit. The appellee opposed the remand, contending that jurisdiction did lie in the Supreme Court. As the Court noted, the appellee urged that the Supreme Court had "jurisdiction under either of two sections of the Act, one relating to dismissal of an indictment based on the construction of the statute on which the indictment is founded and the other to motions in bar." 401 U.S. at 257-258.

The first of the two sections is relevant here because it is identical to the paragraph which grants us jurisdiction to review the dismissal of an indictment except for the additional requirement that a statutory construction question must be presented.[40] The Supreme Court held that the attack on the regulation did not raise such a question, but there would have been no need to discuss that point if the Court had not assumed that the dismissal was "a decision or judgment setting aside, or dismissing" an indictment within the meaning of § 3731.

The disposition which the Court made of the case was necessarily a holding that the Court was of the opinion that the district court order was appealable. For the Supreme Court did not dismiss the appeal (which would have been the only proper action to take if the district court order was something other than a dismissal covered by § 3731); it remanded the case to the Ninth Circuit for further proceedings in that court. See 401 U.S. at 261. The Supreme Court's statutory authority to take that action is predicated on its opinion that the appeal should have been taken to the court of appeals originally.[41]

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[39] See *United States* v. *Weller*, 309 F.Supp. 50 (N.D. Cal. 1969).

[40] Compare footnotes 15 and 16, *supra*.

[41] The relevant paragraph of § 3731 provides:

"If an appeal shall be taken, pursuant to this section, to the Supreme Court of the United States which, in the opinion of that Court, should have been taken to a court of appeals, the Supreme Court shall remand the case to the court of appeals, which shall then have jurisdiction to hear and determine the same as if the appeal had been taken to that court in the first instance."

Perhaps, as has been respectfully suggested, that busy Court did not know what it was doing.[42] In view of the in-depth analysis of the Criminal Appeals Act which other recent cases have required,[43] such a suggestion is implausible. Nor is it likely, or indeed consistent with the statutory directive, that the Court was merely remanding the case for the purpose of having the Ninth Circuit consider the issue argued here. If that had been the Court's purpose, surely it would have said so. Since no member of the Court even questioned the appealability of the dismissal, it is more reasonable to believe that the Court reads the plain language of the second[44] and sixth[45] paragraphs of § 3731 as simply meaning what they say.

The contention that a dismissal is not within § 3731 if the trial court relies on matter which is not identified in the indictment and which relates to the general issue is also foreclosed by *United States* v. *Fruehauf*, 365 U.S. 146. In that case the district judge had dismissed an indictment on the basis of factual matter contained in memoranda filed by the parties which he interpreted as a "judicial admission" by the Government. A direct appeal was taken to the Supreme Court because the Solicitor General contended that a question of statutory construction was presented. That Court "set aside" the ruling dismissing the indictment and remanded the case for trial on the valid indictment. See 365 U.S. at 159.

Although the Court declined to consider the merits of the appeal, its disposition of the case necessarily was predicated on a holding that it had the power to entertain the appeal, a power which would not have existed if the district court's order of dismissal had not been a "decision or judgment setting aside, or dismissing" an indictment

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[42] See *United States* v. *Findley*, 439 F.2d 970, 973 (1st Cir. 1971).

[43] As noted above, *Sisson* was decided on June 29, 1970; *United States* v. *Jorn*, 400 U.S. 470, was decided on January 25, 1971; *Weller* was decided on February 24, 1971.

[44] See note 15, *supra*.

[45] See note 16, *supra*.

within the meaning of § 3731.[46] The author of the *Fruehauf* opinion was perhaps the busiest Justice the Court has ever had; it is nevertheless unlikely that the Criminal Appeals Act has any hidden meaning of which he was unaware. The opinion was written by Mr. Justice Frankfurter.

III.

A concluding comment on the practicalities of the situation may be appropriate. The First Circuit in *Findley* suggested that defendants should be encouraged to seek pretrial rulings on critical issues by assuring them that the rulings will not be appealable.[47] As a practical matter, the suggestion relates primarily to defenses which would not withstand scrutiny on appeal, or at least those which counsel considers so dubious that he would rather subject his client to the ordeal of a criminal trial than take the risk that he could not retain the benefit of an erroneous dismissal. I doubt if lawyers need a guarantee against reversal on appeal as an inducement to seek a pretrial test of the validity of a novel or dubious defense. Assuming, however, that they do, is it more desirable to protect erroneous dismissals of indictments from review than to administer justice with as even a hand as possible?

The Criminal Appeals Act was passed for a twofold purpose; first, to avoid the danger that an erroneous

[46] The court acted pursuant to 28 U.S.C. § 2106, authorizing it to "vacate, set aside or reverse any judgment, decree or order of a court lawfully brought *before* it *for review*, and . . . remand the cause and . . . require such further proceedings to be had as may be just under the circumstances." (Emphasis added.) See 365 U.S. at 158-159. Since the court can remand a case under § 2106 only if "lawfully brought before it for review," the court would have been powerless to take that action if it had no jurisdiction. Thus, by its disposition, the court necessarily decided that it had jurisdiction. Unless § 2106 is an independent grant of appellate jurisdiction, the statutory basis for the court's power to act was necessarily 18 U.S.C. § 3731. Of course, if § 2106 is an independent source of jurisdiction, it applies here.

[47] "If an appeal will lie in the present case, while it cannot if the defendant waits and subjects himself to jeopardy, informed counsel believing they have a defense on the merits will henceforth protect their clients by avoiding an expediting procedure otherwise beneficial to all concerned, and only ignorant and ill-advised defendants will subject their defense on the merits to a government appeal. We will not adopt such a penalizing construction of the statute." *United States v. Findley*, 439 F.2d 970, 974 (1st Cir. 1971).

nonreviewable decision might set a nationwide precedent,[48] and, second, to provide a procedure which would result in more equal treatment for defendants tried before different judges.[49] To the extent that jeopardy attaches, erroneous acquittals may frustrate those objectives.

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[48] "In the case where a man is indicted, and he is brought before the courts and a demurrer is interposed before he is arraigned, upon the ground that the law under which he is charged with the commission of the crime was unconstitutional, utterly null, and void, the judge sustains that demurrer and discharges the prisoner. Now, if that affected only one prisoner, it would be a matter of comparatively slight importance; but it not only affects that prisoner, not only affects the accused in that particular case, but it affects all other persons who may assume to violate the same law; and a law of Congress is set aside, made absolutely null and void and inoperative by the decision of one judge, without the opportunity for the nine judges who sit in the Supreme Court to pass upon the great question whether or not . . . the law solemnly enacted by Congress is or is not constitutional, affecting not simply that accused, but affecting the operation of the law of the land, and affecting all interests which are to be effected by that law and utterly destroying the protection which that law seeks to throw over the persons, property, and transactions of all citizens of the United States." 41 Cong. Rec. 2192 (Feb. 4, 1907, remarks of Sen. Bacon).

"Where it relates to an important subject that is of national concern, in which the welfare of all of the people of the United States is involved, before an act of Congress should be pronounced unconstitutional we should have the opinion of the highest court of the land — the Supreme Court. In my opinion no other court ought to have the ultimate power to place a veto upon an act of Congress." 41 Cong. Rec. 2757 (Feb. 12, 1907, remarks of Sen. Nelson).

There was a general feeling against permitting a "nisi prius judge" or "judge of the most inferior rank" to declare a law unconstitutional and thereby set precedent with no opportunity for Supreme Court review. See, *e.g.*, debates, 41 Cong. Rec. 2190 (Feb. 4, 1907, Sen. Nelson), 2191 (Sen. Bacon), 2757 (Feb. 12, 1907, Sen. Nelson), 2820 (Feb. 13, 1907, Sen. Clarke), 3046 (Feb. 15, 1907, Rep. Jenkins).

[49] See especially statements of Senators Patterson and Carmack set out in note 29, *supra*.

"Judges [differ] as to whether or not a statute is constitutional. In the Senator's State a judge may decide that a statute is unconstitutional and say a prisoner may go free, while in my State a judge may take the view that it is constitutional under the statute in that State, and imprison a man for a violation of its provisions. There is now a provision of law, but there ought not to be, which permits that condition to continue by which a citizen of the Senator's State under an erroneous opinion of a judge in some preliminary matter might escape." 41 Cong. Rec. 2822 (Feb. 13, 1907, remarks of Sen. Clarke).

See also the President's message to Congress, reported in 41 Cong. Rec. at 22 (Dec. 4, 1906).

Nevertheless, the policy of both the Selective Service[10] and the Criminal Appeals Act would dictate that as far as possible all of the many registrants in the *Ehlert* category, for example, be treated uniformly. The principle of equal treatment under the law should prevail over a dubious policy of encouraging erroneous dismissals by equating them to acquittals.

I respectfully dissent.

PELL, *Circuit Judge*, dissenting.

I also join in the dissent. For the reasons ably expressed by Judge Stevens, I cannot agree that jeopardy has attached.

With regard to the principal issue which was before us, the construction of the fifth and sixth paragraphs of 18 U.S.C. §3731, we are all familiar with the abolitionary steps taken in our American procedural jurisprudence, both at the state and federal levels, directed at the ancient writs and formalistic procedures of our common law. The burial of these anachronistic devices, now almost a fait accompli, which may have had some passing pecuniary benefits to the skillful advocate but probably very little long range worth to the litigant who desired to have his case heard expeditiously and on the merits, is generally believed to be a desirable result. The result reached by the *Apex* court and by the majority of this court seems to me to be an unfortunate retrogressive step.

At the risk of oversimplifying the principal issue before us, one on which my brothers have discoursed learnedly and lengthily, I would stand on the basis that when Congress said that an "appeal may be taken by and on behalf of the United States from the district courts to a

[10] Uniform treatment of those meeting the criteria for certain classifications or exemptions has been required. See, *e.g.*, *Oestereich* v. *Selective Service Bd.*, 393 U.S. 233; *Breen* v. *Selective Service Bd.*, 396 U.S. 460. See also *Gutknecht* v. *United States*, 396 U.S. 295 (invalidating delinquency regulations) ("[T]he statutory policy is the selection of persons for training and service 'in an impartial manner.'" 396 U.S. at 304).

court of appeals in all criminal cases . . . [including] from a decision or judgment setting aside or dismissing any indictment . . . ," it meant what it plainly said.

To chart a course on the uncertain sea of legislative history seems to me to be risking the ordinarily attendant possibility of foundering on the shoals of obfuscation.

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APPENDIX E

In the United States Court of Appeals For the Seventh Circuit

SEPTEMBER TERM, 1971 — SEPTEMBER SESSION, 1971

No. 18315

UNITED STATES OF AMERICA,
Plaintiff-Appellant,
v.
DENNIS MICHAEL GUSTAVSON,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

69 CR 374

HON. JAMES B. PARSONS, *Judge.*

Approved: December 14, 1971

Issued: December 28, 1971

Before SWYGERT, *Chief Judge,* and KILEY, FAIRCHILD, CUMMINGS, KERNER, PELL and SPRECHER, *Circuit Judges.*

KERNER, *Circuit Judge.* The defendant, Dennis Michael Gustavson, was indicted for refusing to submit to induction into the Armed Forces. 50 U.S.C. App. §462. Prior to trial, the district court granted defense counsel's motion to dismiss the indictment. The government appeals. We dismiss for lack of appellate jurisdiction.[1]

[1] This case was argued before seven of the eight active members of this court on the same date that this court reheard *en banc United States* v. *Ponto* (No. 18396, slip op. Jul. 7, 1971), ... F. 2d .... (7th Cir. 1971), and *United States* v. *Grochowski* (No. 18874, slip op. Jul. 27, 1971), ... F. 2d .... (7th Cir. 1971). One active judge, Judge Stevens, who participated in the *en banc* rehearing in *Ponto* and *Grochowski*, disqualified himself in this case; Senior Judge Hastings who participated on the *Ponto* and *Grochowski* panels, did not participate in *Gustavson.*

The defendant had been classified 2-S until April, 1968. In the following month, he requested a I-O classification from his local board and subsequently filed SSS Form 150 with it. After a personal appearance in October, the board decided not to reclassify Gustavson I-O because it believed that he was not ". . . a true conscientious objector through religious training and background." His subsequent appeal to the State Board was denied.

On February 14, 1969, Gustavson received an order to report for induction. On March 10, 1969, he reported to the induction station, but refused to submit. He was subsequently indicted.

Prior to trial, defense counsel submitted a motion to dismiss the indictment. That motion was predicated in part on the ground that it was prejudicial for the board to have considered certain information in Gustavson's file without informing him of its consideration at the personal appearance. At Gustavson's physical examination, he wrote in a form entitled "Statement of Law Violations" (U.S.AREC Form 191-R), that he was arrested for assault in 1961. The local board, at the subsequent personal appearance, apparently relied on this information in concluding that Gustavson was not a "true conscientious objector."

Two hearings were held for argument on defendant's motion to dismiss the indictment.[2] Counsel's arguments concerned the prejudicial nature of the board's reliance on the 1961 assault charge at the personal appearance. Defense counsel stated the issue: ". . . was the proceeding fair, did Mr. Gustavson have a chance to know what the board was doing. . . ." The district judge granted the defendant's motion and dismissed the case because he believed that Gustavson should have been informed of the board's consideration of the assault charge and thus did not receive a fair hearing before the board.

The government contends that this court has jurisdiction to entertain this appeal under ¶6 of the Criminal Appeals

[2] Defendant was not present at the first hearing. He was present at the second hearing when the case was dismissed.

Act, 18 U.S.C. §3731.[3] In *United States* v. *Ponto* and *Grochowski* (Nos. 18396, 18874, slip op. Dec. 14, 1971), ... F. 2d ..... (7th Cir. 1971), this court, sitting *en banc*, held that appeal by the government under ¶6 is permitted only from a dismissal based on a defect in the indictment or in the institution of the prosecution. In the case at bar, the dismissal was not based on these deficiencies, but rather on the fairness of the procedures employed by the local board. Thus, the government may not appeal to this court under §3731.

We also find that the double jeopardy clause of the Fifth Amendment prohibits the government from appealing. The judge's dismissal order was, in fact, a ruling on the merits of a defense which could have been raised at trial.[4] This constitutes an acquittal from which no government appeal is permitted. *United States* v. *Ponto* and *Grochowski*, rehearing *en banc* (Nos. 18396, 18874, slip op. Dec. 14, 1971), ... F. 2d ..... (7th Cir. 1971).

APPEAL DISMISSED.

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[3] An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section.

[4] The judge stated the issue before him:

A classification by an appeal board after a local board has had before it information which it failed to bring to the attention of the registrant at the time of his hearing calling for his classification as a conscientious objector, which would defeat such classification and properly would defeat such classification, but failed to bring it to his attention, everything from there on in the file becomes a nullity and is of naught, ...

The judge also believed that a decision on this defense was capable of determination without the necessity of trial. See R. 12(b)(1) and discussion of the Rule in *United States* v. *Ponto*, and *Grochowski*, rehearing *en banc* (Nos. 18396, 18874, slip op. Dec. 14, 1971), ... F. 2d .... (7th Cir. 1971).

KILEY and FAIRCHILD, *Circuit Judges*, concurring. We concur, with the comment noted in our concurrence in *United States of America* v. *Richard Victor Ponto*, and *United States of America* v. *Raymond J. Grochowski*, (Nos. 18396, 18874, Slip op. Dec. 14, 1971) ..... F. 2d ..... (7th Cir. 1971).

No. 18315

CUMMINGS and SPRECHER, *Circuit Judges*, dissenting. For the reasons expressed in Judge Stevens' scholarly dissent in *United States* v. *Ponto*, No. 18396, and *United States* v. *Grochowski*, No. 18874, we conclude that the district judge's order dismissing the indictment was reviewable here under 18 U.S.C. § 3731. As in *Ponto* and *Grochowski*, Gustavson's trial never began. There had been no waiver of a jury, and no jurors had been impanelled. Defendant's motion to dismiss the indictment pursuant to Rule 12 of the Federal Rules of Criminal Procedure was understood by all parties to be a pre-trial motion and was treated as such. Plainly jeopardy never attached. In view of the majority's jurisdictional holding, we do not reach the merits.

No. 18315

PELL, *Circuit Judge*, dissenting. I dissent for the same reasons expressed in my dissenting opinion in *United States* v. *Ponto* and *Grochowski* (Nos. 18396, 18874, slip op. Dec. 14, 1971) ..... F. 2d ..... (7th Cir. 1971); and concur with Judge Cummings' dissent on the issue of jeopardy.

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Clerk of the United States Court of Appeals for the Seventh Circuit.

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APPENDIX F

In the United States Court of Appeals For the Seventh Circuit

SEPTEMBER TERM, 1970 — JANUARY SESSION, 1971

No. 18396

UNITED STATES OF AMERICA,
Plaintiff-Appellant,
v.
RICHARD VICTOR PONTO,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

JULY 7, 1971

Before HASTINGS, *Senior Circuit Judge,* and KERNER and STEVENS, *Circuit Judges.*

KERNER, *Circuit Judge.* The defendant, Richard Victor Ponto, was indicted for failure to submit to induction into the Armed Forces. 50 U.S.C. App. §462. After hearings before the district court but prior to trial, the judge granted the defendant's motion alternatively requesting the court "to dismiss the indictment or for a directed judgment of acquittal." The government appeals.

The defendant, who was living with his wife and child, had been classified III-A (hardship) by his local draft board. In January, 1966, he was reclassified I-A after the board learned that he was no longer living with his wife and child nor contributing to their support. On March 3, 1967, after other unsuccessful attempts to contact defendant, it ordered Ponto to report for induction on March

27, 1967; the order was returned by the post office indicating that defendant had moved.

On March 27, the day he was to report for induction, defendant requested a III-A classification claiming that he was now the sole means of support for his mother, who, he stated, "is sick and unable to work at this time." He filed a Dependency Questionnaire (SSS Form 118) representing his annual contribution to his mother's support to be $1,500; he listed his mother's annual income as $2,500. His income for the prior year was $5,000.

The board responded that it had considered Ponto's request for deferment and decided "that there be no change in your classification." Ponto was subsequently given a courtesy hearing at which the board requested him to produce income tax returns for his mother and himself.

Two months later, on July 14, 1967, the board, not receiving Ponto's income tax returns, decided again "that there be no change in your classification and that your orders stand." On August 11, the board reached the same conclusion after considering W-2 forms Ponto submitted for himself and his mother.

On September 18, 1967, the defendant was ordered to report for induction, but refused to submit. In March, 1968, the United States Attorney's office, in a letter to the Deputy State Director of the Selective Service System of Illinois, indicated that it would not prosecute Ponto. In May, 1969, however, the defendant was indicted.

Prior to hearings before the district judge, counsel for the defendant filed a motion with the court entitled "Motion to dismiss the indictment or for a directed judgment of acquittal." In the motion, counsel called attention to two letters he found in the Selective Service file:

a. A letter from the United States Attorney to the Deputy State Director of the Selective Service System, dated March 18, 1968, recommending that the outstanding order for induction of defendant be cancelled and that his classification be reopened (Exhibit A).

b. A letter from the United States Attorney to the Chief of the Administrative Regulations Section,

> Criminal Division, Department of Justice, dated October 8, 1968, stating that the United States Attorney's office was of the opinion that a prima facie case for a hardship deferment had been made by defendant and that denial of the III-A classification by the Local Board was in error (Exhibit B).

Following this recitation, counsel stated in the written motion:

> One can conclude from these letters that the United States Attorney concurs in the legal correctness of the defendant's plea of not guilty. To put the defendant to the anxiety of a trial and to consume the court's time in litigating an issue upon which the parties agree is the height of folly.
>
> Wherefore, the defendant moves for a dismissal of the indictment or, in the alternative, for a directed judgment of acquittal.

Hearings were conducted on three occasions before the district judge in which counsel for both sides argued the defendant's pending motion. Defendant was not present at any of the hearings. On the first day, the judge stated that he denied the defendant's motion without prejudice. Following this, counsel and the judge discussed the possibility of the defendant voluntarily agreeing to induction. The case was continued for a few days in order for defense counsel to inquire into this possibility.

On the second hearing date, a suggestion was made by the judge that the United States Attorney review the Selective Service file to determine whether the board had properly processed Ponto's claim for re-classification. The United States Attorney also agreed to review the cases submitted to the court by defense counsel.

On the following day, the final hearing was held. Argument concerned the circumstances surrounding the defendant's attempt to reopen his classification. The judge stated at one point:

> The question—there are two questions. One is whether or not in fact there was a proper basis for this kind of a deferment, and if there was a dependency that didn't exist in the same quality and in the same

nature that existed at the time of the notice for him to report for induction or at the last appearance before the local board.

The second question is whether or not the local board in opening up the case and having the file reviewed unilaterally deprived him of a right to appeal, should they decide against him on the basis of their review.

The judge then said that he would allow "a minute motion for summary supported with an exhibit, to-wit, a copy of the Selective Service file."

The United States Attorney responded:

Well, your Honor, we would object to proceeding under a motion for summary judgment because, to my knowledge, there is no such thing in a criminal case. Now, I just would object to that most vigorously. That just is not a proper way to dispose of a case.

The Court: A motion to dismiss.

[Defense Counsel]: I have made my motion to dismiss.

The Court: Supported by a copy of the Selective Service file, . . .

Argument continued on the propriety of the board's refusal to reopen Ponto's file. Statements were made concerning information in the Selective Service file and of the applicable regulations governing lateness and the consideration by a board of evidence filed by a registrant.

After some discussion of these issues, the judge stated:

I honestly am of the opinion that in order to interpret that regulation as constitutional, as not a violation of due process of law, I must interpret it as reading that the board finds that what is submitted is not evidence or, if it is evidence, it is not new, but that if the board finds that what is submitted is both evidence and new, it must reopen the case, for to do otherwise would be to deny the registrant the opportunity of appeal.

And, after a short colloquy:

[Defense counsel]: Will your Honor grant my motion to dismiss?

The Court: Yes. Attach a copy of the file to your minute order and motion.

The government appeals the court's order, arguing that defendant had failed to state a *prima facie* case which would entitle him to a reopening, as required by §1625.2 of the Selective Service Regulations, 32 C.F.R. §1625.2. It also argues that the defendant was barred from a reopening under §1625.2 because he requested reclassification after the mailing of an induction order to him, and he did not show a change in status due to circumstances over which he had no control. The defendant, relying on the Criminal Appeals Act, 18 U.S.C. §3731, argues to us that the government has no right to appeal the order of the district court or, in the alternative, that its appeal must be directed to the Supreme Court.

We turn our attention to the jurisdictional question. Section 3731 deals with the government's right to appeal in a criminal case. The pertinent provisions state:

> An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:
>
> • • • • •
>
> From a decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.
>
> An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases in the following instances:
>
> From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, except when a direct appeal to the Supreme Court of the United States is provided by this section.[1]
>
> • • • • •

[1] The remaining provisions of §3731 provide for appeal to the Supreme Court

> From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

and an appeal to the Court of Appeals

> From a decision arresting a judgment of conviction except where a direct appeal to the Supreme Court of the United States is provided by this section.

Both parties concede that neither of these paragraphs has relevance to the right of the government to appeal in this case.

The defendant, relying on §3731, posits two interpretations of the disposition by the judge. First, he asserts that the motion for "a dismissal of the indictment, or in the alternative, for a directed judgment of acquittal" can be characterized as a "motion in bar," directly appealable to the Supreme Court. (See the second paragraph of §3731 quoted above.) Second, he claims that the order was not a judgment "setting aside, or dismissing any indictment . . .," (see the fourth paragraph of §3731 quoted above) and thus not appealable to us.

We approach the question of the government's right to appeal and our jurisdiction under §3731 with some trepidation. Courts have admitted difficulty in interpreting the confusing provisions of §3731.[2] *United States* v. *Sisson*, 399 U.S. 267, 307-08 (1970); *United States* v. *Weller*, 39 U.S. L.W. 4261 (Feb. 24, 1971). The act requires us to characterize the disposition of the district court by reference to common law pleading distinctions which have been altered by the Federal Rules of Criminal Procedure. See *United States* v. *Sisson*, *supra* at 308. These problems in applying the criminal pleading terms of §3731 are compounded by the hybrid nature of a Selective Service prosecution. In one sense, the proceeding is like any other criminal prosecution and is governed by the Federal Rules of Criminal Procedure. In another sense, it serves as a forum for pre-induction judicial review of the classification process, since a defendant may raise as a defense the propriety of the board's processing of his claim for reclassification.[3] In the Selective Service case at bar, it becomes even more difficult to classify the order of the court by reference to common law pleading terms since the motion which the court granted had alternatively requested a dismissal of the indictment or a judgment of acquittal.

We are convinced, however, that the order below cannot be characterized as a "motion in bar." It has now been settled that a motion in bar concerns facts which would not be introduced by the prosecution or defense at trial. As the *Sisson* Court stated at 301:

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[2] Congress, in the Omnibus Crime Control Act of 1970, §14(a), 84 Stat. 1890 (1971), has amended §3731; but these new provisions apply to indictments entered after January 2, 1971. Ponto was indicted in May, 1969.

[3] See 50 U.S.C. App. §460(b)(3).

> Even under the most expansive view, . . . a motion in bar cannot be granted on the basis of facts that would necessarily be tried with the general issue in the case.

Some extraneous factor, such as the statute of limitations or double jeopardy, could be properly characterized as a motion in bar. *United States* v. *Weller, supra.*

In the instant case, there was nothing raised in the defendant's motion or in the argument of defense counsel which presented an issue which could be characterized as extraneous to the theories which would have been raised by prosecution or defense at trial if it had occurred. Defense counsel appeared to be urging to the district court that the defendant had established a right to a III-A classification, and that the board's erroneous refusal to reopen entitled him to an acquittal. This constitutes a classic defense in a Selective Service case.

Thus, we must reject the defendant's argument that the case is appealable to the Supreme Court.[4]

We are also of the opinion that §3731 prohibits a government appeal to this court. An appeal by the government from a pre-trial order, as in this case, may be taken to the court of appeals under §3731 only when the order can be characterized as one ". . . setting aside or dismissing any indictment or information," see ¶5 of §3731.[5] The Ninth Circuit, sitting *en banc*, in *United States* v. *Apex Distributing Co.*, 270 F. 2d 747 (9th Cir. 1959), has held that this

[4] At the time of oral argument, the defendant urged as authority *United States* v. *Fix*, 429 F. 2d 619 (9th Cir. 1970), which was decided before *Sisson* and *Weller*. In *Fix*, at 621, the Ninth Circuit, relying on earlier precedent of the Supreme Court, held that a motion in bar was ". . . a ruling which, if it is not reversed on appeal, will forever bar the prosecution of the defendant Fix upon the charge made in the indictment." The court certified the appeal to the Supreme Court ". . . with frank recognition that our answer to this elusive question may be wrong. . . ." at 622.

The subsequent definition by the Supreme Court of a "motion in bar" in *Sisson* and *Weller* differed from the one in *Fix*. The Supreme Court dismissed the *Fix* appeal, 400 U.S. 874, apparently upon agreement by both of the parties in the case. See Rule 60, Rules of Practice of the Supreme Court of the United States. Thus, because of subsequent developments, we cannot rely on *Fix* as authority in this case.

[5] Otherwise, the government has no right to appeal. Section 3731 provides the only authority for the government to appeal in a criminal case. Furthermore, §3731 must be strictly construed against the government's right to appeal. *United States* v. *Borden*, 308 U.S. 188, 192 (1939).

portion of §3731 permits appeal only from a dismissal which is based upon a defect in the indictment itself, or in the institution of the prosecution.

After reviewing the proceedings below and the motion filed by defense counsel, we conclude that the dismissal order was not based on a defect in the indictment or in the institution of the prosecution. No reference is made to the wording or form of the indictment itself or the manner in which the case was presented to or deliberated by the Grand Jury. Rather, the arguments of counsel and the comments of the trial judge at the pre-trial hearings concerned the propriety of the board's procedures in processing Ponto's claim for III-A reclassification. The district judge apparently ruled that the board had erroneously refused to reopen Ponto's classification. This ground for the judge's pre-trial order of dismissal—that the board incorrectly refused to reopen—would have been raised as a defense at trial.

We believe that disposition on this ground, prior to trial, is similar to an order of acquittal, from which the government is not entitled to appeal. For this conclusion, we find helpful a recent decision by the Court of Appeals for the First Circuit in *United States* v. *Findley*, No. 7765 (1st Cir., March 22, 1971). In *Findley*, the defendant was indicted for failing to submit under §462 and filed a motion to dismiss, arguing that the board had not stated any reason for its refusal to reopen his classification. The trial court, after inquiring whether the defendant had established a *prima facie* case for a new classification (a defense which would have been raised at trial), granted the defendant's motion to dismiss. The First Circuit held that §3731 did not authorize a government appeal from this ruling of dismissal. The court observed (p. 4, slip op.):

> . . . if a dismissal is a result of the showing of evidentiary facts dehors the indictment which, if established at trial, would constitute a defense on the merits, the court's ruling, however described, . . . is in effect an acquittal . . ., and thus not within the intended purpose of the appeals statute. . . . There can be no question, then, that, had he waited and proved these facts at trial defendant would, assuming the court's view of

> the law is correct, have been entitled to an acquittal from which, under *Sisson*, no appeal would lie.

See also *United States* v. *Sisson, supra* at 301-302; *United States* v. *Ramos*, 413 F. 2d 743, 744 n. 1 (1st Cir. 1969).

This analysis from *Findley* persuades us that the instant order dismissing the case was in the nature of an acquittal and was not appealable by the government.[6] The fact that the defendant's motion requested a dismissal of the indictment is not dispositive or even probative to us, since it, alternatively, requested a "directed judgment of acquittal." That the judge may not have examined the Selective Service file before his ruling does not change the character of the dismissal order. Perhaps the judge was in error in not reviewing the file and merely relying on the statements of counsel. Yet, it does not follow that the failure by the judge to review the file, albeit error, would change the

---

[6] It could be argued that the recent Supreme Court decision in *United States* v. *Weller*, 39 U.S. L.W. 4261 (Feb. 24, 1971), suggests that the government can take an appeal to us in this case. In *Weller*, the ruling of the district court had been based on facts which would have been raised as a defense in the Selective Service trial. The government appealed directly to the Supreme Court. The Court, after analyzing the possible bases for its jurisdiction under §3731, decided that it did not have jurisdiction to hear the government's appeal and remanded the case to the court of appeals.

This remand order could be interpreted as a holding by the Supreme Court that the court of appeals had jurisdiction under §3731.

We do not believe that such an implication arises from the mere order of remand to the court of appeals. Most likely, the Court remanded to allow the court of appeals to decide whether it had jurisdiction under §3731. The Act itself provides that if the Supreme Court is of the opinion that the appeal should have been taken to the court of appeals, then it shall remand to that court ". . . which shall then have jurisdiction to hear and determine the same as if the appeal had been taken to that court in the first instance." We believe that this statutory language authorizes the court of appeals to consider anew the question of its own jurisdiction under §3731, which it would have done ". . . if the appeal had been taken to that court in the first instance."

The First Circuit in *Findley* offered another explanation:

> Examination of the *Weller* briefs reveals no question raised, and no discussion, except as to the jurisdiction of the Supreme Court. Both parties proceeded on the assumption that jurisdiction in the court of appeals depended solely on a resolution of that question. That there may be a further question as to circuit court jurisdiction is not obvious from the face of the statute. We intend no possible disrespect towards a busy court when we conclude that the fact that such a question exists might well have escaped its attention. (pp. 5-6, slip op.)

In any event, we believe that the authority of *Weller* concerns the jurisdiction of the Supreme Court, and not the court of appeals, under §3731.

character of his decision or affect the government's right to appeal under §3731.

We simply can find nothing in the record which suggests that the judge dismissed this case because of a defect in the indictment or in the institution of the prosecution. For this reason, we must dismiss this appeal for want of jurisdiction.

APPEAL DISMISSED.

STEVENS, *Circuit Judge*, dissenting.

In my opinion Judge Parsons' order cannot fairly be interpreted as an acquittal. A motion for acquittal may be filed only "after the evidence on either side is closed. . . ."[1] In this case, the trial never started. The jury had not been impaneled or waived and no evidence had been offered or received. I do not believe a defendant should have the benefit of a judgment of acquittal before he has been placed in jeopardy.

Judge Kerner has demonstrated that the district court did not sustain a plea in bar, and therefore if an appeal lies, it is to this court rather than the Supreme Court. The trial judge stated unequivocally that he was granting the defendant's motion to dismiss the indictment; in my opinion, that is the only proper interpretation of his order. If the Criminal Appeals Act means what it says, such an order is appealable.[2]

As Judge Kerner correctly points out, however, the Ninth Circuit reads the legislative history of the 1942 amendment to the statute to confine our appellate jurisdiction to review of dismissals based on a defect in the indictment or in the institution of the prosecution. See *United States* v. *Apex Distributing Co.*, 270 F.2d 747 (9th Cir. 1959). With all respect, I do not find the comments in the Committee Report on which that court relies sufficiently persuasive to overcome the plain language of the statute

[1] Rule 29 F.R.Crim.P. In *United States* v. *Sisson*, 399 U.S. 267, the motion was filed after both parties had rested.

[2] The statute provides, in part:

"An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section." 18 U.S.C. § 3731.

itself.[3] Moreover, both the Supreme Court and this court have assumed, without expressly deciding,[4] that our jurisdiction is not so narrowly limited. *United States* v. *Weller*, 401 U.S. 254; *United States* v. *Brodson*, 234 F.2d 97 (7th Cir. 1956).

Although I recognize that the Supreme Court's determination of its own narrow jurisdiction under the Criminal Appeals Act requires consideration of a district court's grounds of decision,[5] I believe the statutory language used to define our jurisdiction requires us to consider the effect[6] of the order entered by the district court rather than the reasons for its entry. Otherwise it might be impossible to determine whether or not an appeal lies, since as in this case the trial judge's colloquies with counsel may do more to obscure than to identify the precise basis for his order of dismissal. The fact that the ruling was based on statements of counsel, or perhaps other matters not properly a part of the record, may have compounded his error, but

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[3] For example, the following language in the Committee Report, not quoted in the *Apex* opinion, suggests the same broad right to appeal from *all* dismissals as the statutory language itself:

"The bill would have the effect of enlarging the power and authority of the United States to appeal in the following ways: . . .

"3. Permit appeals to the circuit court of appeals from *all* decisions and judgments *having the effect* of quashing, setting aside, or sustaining demurrers or pleas in abatement to indictments or informations and from *all* decisions arresting judgments of conviction except in those instances where direct appeals to the Supreme Court are permitted under the existing law. . . ." U.S. Code Cong. Ser. 77th Cong., 2d Sess. 1942, pp. 487-88. (Emphasis added.)

The legislative history of the amendment to § 3731 contained in the Omnibus Crime Control Act of 1970, 84 Stat. 1880, makes it perfectly clear that if this prosecution had been commenced subsequent to January 2, 1971, the appeal would lie. Conf. Rep. No. 91-1768, 91st Cong., 2d Sess. 1970, U.S. Code Cong. & Ad. News pp. 5848-49. Insofar as the precise question presented to us is concerned, this amendment may support Judge Kerner's reading of the statute by indicating that Congress felt broader review was required, or with equal force may support my reading on the assumption that Congress desired to remove the ambiguity, engendered by the decision in *Apex*, as to its 1942 purpose in using language it then considered unambiguous.

[4] It should be noted, however, that the Supreme Court had no statutory authority to remand *Weller* to the Court of Appeals for the Ninth Circuit unless ". . . in the opinion of that Court [the appeal] should have been taken to a court of appeals. . . ." 18 U.S.C. § 3731.

[5] See *United States* v. *Swift & Co.*, 318 U.S. 442; *United States* v. *Carbone*, 327 U.S. 633, Frankfurter, J., dissenting at 642-44.

[6] See footnote 3, *supra*.

should not negate our power to set the order aside pursuant to 28 U.S.C. § 2106. *United States* v. *Fruehauf*, 365 U.S. 146. Since I find no defect in the indictment, I would reverse and remand for trial.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

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